

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

Eddingston, et al.,                   \* Civil Docket No.  
Plaintiffs,                           \* 2:12-cv-00422  
  \* Marshall, Texas  
-VS-                                   \*  
  \*  
UBS Financial Services,           \*  
Inc.,                                 \* June 4, 2013  
Defendant.                         \* 9:00 A.M.

\*\*\*\*\*

Hendricks, et al.,                   \* Civil Docket No.  
Plaintiffs,                           \* 2:12-cv-00606  
  \* Marshall, Texas  
-VS-                                   \*  
  \*  
UBS Financial Services,           \*  
Inc.,                                 \* June 4, 2013  
Defendant.                         \* 9:00 A.M.

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**TRANSCRIPT OF CLASS CERTIFICATION HEARING**  
**BEFORE THE HONORABLE ROY S. PAYNE**  
**UNITED STATES MAGISTRATE JUDGE**  
\*\*\*\*\*

**APPEARANCES:**

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18                   (Proceedings recorded by mechanical stenography,  
19                   transcript produced on a CAT system.)  
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**P R O C E E D I N G S**

THE COURT: Good morning. Please be seated.

For the record, we're here for the class certification hearing in the Eddington and Hendricks matters versus UBS, which are 2:12-422 and 2:12-606 respectively.

Would Counsel state their appearances for the record?

MR. ANDERSON: Yes, Your Honor. My name is Ted Anderson; I'm with the law firm of Kilgore & Kilgore. I'm here on behalf of the Plaintiff.

I have with me today, Robert Goodman from my law firm, who is to my left. Also arguing with me today will be Mr. Peter Stris from the Stris Maher law firm, and Mr. Brendan Maher from the Stris Maher law firm.

Mr. Sam Baxter, who is our local Counsel, from McKool Smith, needs no introduction. And Mr. Brian Bro from the Bro law firm of Houston is also proposed class Counsel in the case, Your Honor.

THE COURT: All right. Thank you, Mr. Anderson.

MR. SMITH: And Your Honor, for UBS, I'm Michael Smith. We have from our General Counsel's

09:04AM 1 office, Mr. Stephen Bird.

09:04AM 2 And then from the Gibson Dunn firm, Ms.

09:04AM 3 Nicci Warr, Mr. Eugene Scalia, and Mr. Paul

09:04AM 4 Blankenstein.

09:04AM 5 MR. BLANKENSTEIN: Good morning, Your

09:04AM 6 Honor.

09:04AM 7 MR. SMITH: And we're ready to proceed,

09:04AM 8 Your Honor.

09:04AM 9 THE COURT: All right. Thank you, Mr.

09:04AM 10 Smith.

09:04AM 11 I know there have been some recent

09:04AM 12 motions filed and we may need to take those up before

09:04AM 13 we start. When we do start the arguing, what I'd like

09:04AM 14 to do is -- is just to help me understand the issues as

09:05AM 15 much as possible, I'd like to break the argument down

09:05AM 16 into individual sections and hear from both sides on

09:05AM 17 each issue before we move on to the next issue, because

09:05AM 18 I think there are -- the briefs have done a very good

09:05AM 19 job of stating each parties' side, but they don't

09:05AM 20 always answer each other completely and I'd like to

09:05AM 21 have the chance to do that here orally.

09:05AM 22 But are there matters that either side

09:05AM 23 wants to take up before we turn to the argument on the

09:05AM 24 motion?

09:05AM 25 MR. ANDERSON: Your Honor, on behalf of

09:05AM 1 the Plaintiffs, we have filed and reurged our Amended  
09:05AM 2 Motion for Continuance. We are requesting that, at an  
09:05AM 3 abundance of caution, because if the Court today  
09:05AM 4 believes that we need to get to the merits of whether  
09:05AM 5 or not the PartnerPlus Plan is, in fact, a retirement  
09:05AM 6 plan covered by ERISA, we simply have not had enough  
09:06AM 7 time or opportunity to obtain the discovery that we  
09:06AM 8 need on the facts and circumstances that surround how  
09:06AM 9 the PartnerPlus Plan was operated.

09:06AM 10 We don't think that the Court needs to  
09:06AM 11 reach that issue today and so with the Court's  
09:06AM 12 indulgence, I would like to reserve the hearing on that  
09:06AM 13 motion until after we proceed through the class action  
09:06AM 14 issues. If at that time the Court wants to hear us, we  
09:06AM 15 will reurge it again.

09:06AM 16 And just to remind the Court, we had  
09:06AM 17 filed and were here last Tuesday on a Motion for  
09:06AM 18 Continuance and your order from the bench was that you  
09:06AM 19 would permit us to reurge it today, if need -- if need  
09:06AM 20 be.

09:06AM 21 THE COURT: It's your motion, so if you  
09:06AM 22 want to withhold argument until after the hearing, I --  
09:06AM 23 I don't have a problem accommodating that request.

09:06AM 24 MR. ANDERSON: Thank you, Your Honor.

09:06AM 25 THE COURT: All right. Are there any

09:06AM 1 other matters we need to take up before we start?

09:07AM 2 MR. ANDERSON: Nothing else, Your Honor,  
09:07AM 3 from the Plaintiff.

09:07AM 4 MR. SMITH: The only issue we would have  
09:07AM 5 is a procedural one, Your Honor, how the Court wanted  
09:07AM 6 to handle the exhibits for the hearing.

09:07AM 7 For our part we already have a lion's  
09:07AM 8 share of our exhibits before the Court in the record.  
09:07AM 9 We will be bringing a disk to the Court shortly, per  
09:07AM 10 your instructions at the last hearing, to add the --  
09:07AM 11 some additional plans and the deposition excerpts that  
09:07AM 12 we've referenced. But we've -- how that's handled is  
09:07AM 13 just at the Court's pleasure.

09:07AM 14 THE COURT: All right. Are there  
09:07AM 15 objections to the exhibits that each side wants to  
09:07AM 16 offer at this hearing?

09:07AM 17 MR. ANDERSON: I don't believe so, Your  
09:07AM 18 Honor. The only objections that we have is with regard  
09:07AM 19 to the expert opinion that is the issue that we brought  
09:07AM 20 up to you previously.

09:07AM 21 THE COURT: All right. And the -- with  
09:07AM 22 respect to the opinions themselves, I think the issue  
09:07AM 23 we addressed last week had to do with whether or not  
09:08AM 24 disclosures had been proper and whether there were  
09:08AM 25 timing issues that would prevent those opinions from

09:08AM 1 being offered. And I ruled and will continue to rule  
09:08AM 2 that the objections are not well-founded on that issue.

09:08AM 3 Anything else on that that we need to  
09:08AM 4 take --

09:08AM 5 MR. ANDERSON: Your Honor, the -- the  
09:08AM 6 remaining objection has to do with the relevance of the  
09:08AM 7 expert opinions and whether or not they are relevant at  
09:08AM 8 this stage of the class action. It is our belief that  
09:08AM 9 a determination as to whether or not the PartnerPlus  
09:08AM 10 Plan is, in fact, a retirement plan covered by ERISA is  
09:08AM 11 a merits issue.

09:08AM 12 Both of the expert opinions that have  
09:08AM 13 been offered by the Defendants go directly to that  
09:08AM 14 point. In fact, on the first pages of their expert  
09:09AM 15 opinions, they say those very things. And again, we  
09:09AM 16 have just not had -- we don't believe it's appropriate  
09:09AM 17 at this stage of the class certification stage and  
09:09AM 18 if -- if it is relevant, then we need a partial  
09:09AM 19 continuance so that we can cross-examine their experts,  
09:09AM 20 get expert opinions for rebuttal, and then to get  
09:09AM 21 merits discovery of the circumstances that surround how  
09:09AM 22 the PartnerPlus Plan was administered under the  
09:09AM 23 circumstances.

09:09AM 24 THE COURT: All right. The --

09:09AM 25 MR. ANDERSON: And we filed a written

09:09AM 1 objection that I incorporate as well, Your Honor.

09:09AM 2 THE COURT: With respect to the issue of  
09:09AM 3 relevance, while I do not believe that it's necessary  
09:09AM 4 for the Court to determine finally at this hearing  
09:09AM 5 whether ERISA covers this plan, I -- I can't say that  
09:10AM 6 the issue is not relevant and I'll overrule that  
09:10AM 7 objection.

09:10AM 8 Mr. Scalia?

09:10AM 9 MR. SCALIA: Just briefly, Your Honor.  
09:10AM 10 First, we do not have objections to the revised exhibit  
09:10AM 11 list that was filed by the Plaintiffs last night. And  
09:10AM 12 Your Honor, since Mr. Anderson has now spent a few  
09:10AM 13 minutes reurging certain points with regard to the  
09:10AM 14 expert declarations, I'll just say this, he referred to  
09:10AM 15 it as a merits issue and, Your Honor, that's a red  
09:10AM 16 herring.

09:10AM 17 We don't think it is necessary for the  
09:10AM 18 Court, as this case is now postured, to delve equally  
09:10AM 19 into the so-called merits issues. But it's actually  
09:10AM 20 been extraordinary that a class of Plaintiffs are  
09:10AM 21 before you and don't want to talk about the merits of  
09:10AM 22 their case. Ordinarily in my experience in a  
09:10AM 23 discrimination case, for example, Plaintiffs' Counsel  
09:10AM 24 is -- is -- there's nothing more fervent about it than  
09:10AM 25 advocating the merits of the case. So it is -- it is



09:11AM 1 unusual. Why they're running from the merits, I think  
09:11AM 2 I know why, but it's -- I just think that it's unusual.

09:11AM 3 And finally, Your Honor, the suggestion  
09:11AM 4 that if something touches upon the merits is taboo and  
09:11AM 5 the Court can't go near it, is just flatly inconsistent  
09:11AM 6 with what the Supreme Court has now said in 2011, 2013.  
09:11AM 7 And we'll get to this later, but just for the record,  
09:11AM 8 what this reflects is a real misunderstanding by  
09:11AM 9 Plaintiffs' Counsel about what is fair game and what's  
09:11AM 10 not in a classification hearing. So I just put that  
09:11AM 11 marker down now and I think we'll be hearing that error  
09:11AM 12 replicated later this morning.

09:11AM 13 THE COURT: All right. And thank you,  
09:11AM 14 Mr. Scalia. I will say that I -- I believe that the  
09:11AM 15 Plaintiffs have fairly thoroughly addressed their  
09:11AM 16 position on ERISA coverage, if that's the merits issue  
09:11AM 17 we're talking about, in their briefing. And I don't  
09:11AM 18 understand their objection to be discussing that issue  
09:11AM 19 at this hearing, but rather concluding that issue at  
09:12AM 20 this hearing. But to the extent that they don't want  
09:12AM 21 to talk about it, they'll be disappointed in that we're  
09:12AM 22 going to allow you to talk about it, so --

09:12AM 23 MR. SCALIA: Thanks, Your Honor.

09:12AM 24 THE COURT: -- the -- all right. So with  
09:12AM 25 respect to the exhibits, then, it's my understanding

09:12AM 1 that there are no objections to the exhibits listed by  
09:12AM 2 each side on their final exhibit list and those will be  
09:12AM 3 deemed admitted. I guess I want to make sure that we  
09:12AM 4 have those final exhibit lists in the record. Have --

09:12AM 5 MR. ANDERSON: Your Honor --

09:12AM 6 THE COURT: -- they been filed?

09:12AM 7 MR. ANDERSON: Your Honor, I believe  
09:12AM 8 that we have filed Plaintiffs' Exhibits 1 through 50 on  
09:12AM 9 yesterday -- yesterday afternoon. So if they are not  
09:12AM 10 with the Court, we will check before the close of  
09:12AM 11 today's hearing and make sure that they are before the  
09:13AM 12 Court.

09:13AM 13 THE COURT: Those were e-filed; is that  
09:13AM 14 right or --

09:13AM 15 MR. ANDERSON: No, we sent over hard  
09:13AM 16 copies --

09:13AM 17 THE COURT: Okay.

09:13AM 18 MR. ANDERSON: -- and a CD.

09:13AM 19 THE COURT: Okay.

09:13AM 20 MR. ANDERSON: So you should have  
09:13AM 21 binders of the exhibits. And we -- Judge, we reduced  
09:13AM 22 it by two-thirds, so --

09:13AM 23 THE COURT: Well, I would -- my only  
09:13AM 24 quibble would then be with the word filed. They --  
09:13AM 25 those have been tendered, I take it, to chambers, is

09:13AM 1 what you're saying?

09:13AM 2 MR. ANDERSON: Yes, Your Honor.

09:13AM 3 THE COURT: Okay. Then we will proceed  
09:13AM 4 to file them into the record at this time. And you say  
09:13AM 5 that's Plaintiffs' Exhibits 1 through 50?

09:13AM 6 MR. ANDERSON: Yes, Your Honor.

09:13AM 7 THE COURT: Okay. And -- and those are  
09:13AM 8 admitted without objection, Mr. Scalia; is that right?

09:13AM 9 MR. SCALIA: That's correct, Your Honor.

09:13AM 10 THE COURT: All right. And Mr. Scalia,  
09:13AM 11 what about your objections or Mr. Smith, whoever wants  
09:13AM 12 to address that?

09:14AM 13 MS. WARR: Your Honor, we have -- we're  
09:14AM 14 relying on several of the exhibits that were appended  
09:14AM 15 to the briefs that we filed, so those have been filed  
09:14AM 16 with the Court. And we also have for you a CD that  
09:14AM 17 contains the deposition transcript excerpts that we're  
09:14AM 18 relying on, as well as some additional compensation and  
09:14AM 19 early classic plans that are identified in our exhibit  
09:14AM 20 list and we'll have hard copies for you here today as  
09:14AM 21 well.

09:14AM 22 THE COURT: So all of the exhibits that  
09:14AM 23 the Defendant is relying upon have either been e-filed  
09:14AM 24 or are on the disk that Mr. Smith has?

09:14AM 25 MS. WARR: Correct, Your Honor.

09:14AM 1 THE COURT: All right. Mr. Smith, if  
09:14AM 2 you could tender one to the clerk and do you have a  
09:14AM 3 copy also that -- that you have tendered to the other  
09:14AM 4 side?

09:14AM 5 MR. SMITH: I can do so now, Your Honor.

09:14AM 6 THE COURT: Okay. I always like to see  
09:14AM 7 it done. There's something reassuring about that.

09:15AM 8 Well, Counsel has spent more time on this  
09:15AM 9 than I have, but unless you have a preferred way to  
09:15AM 10 approach it, we can just approach it on an  
09:15AM 11 element-by-element basis starting with Rule 23(a) and  
09:15AM 12 work through the -- the numbered sections of that. You  
09:15AM 13 pretty much briefed it that way, I think, but --

09:15AM 14 MR. ANDERSON: Yes.

09:15AM 15 THE COURT: -- I'm quite happy if -- if  
09:15AM 16 either side thinks it's more efficient to proceed in  
09:15AM 17 another way, to do that.

09:15AM 18 MR. ANDERSON: Your Honor, I just want  
09:15AM 19 to make sure the record is clear, that the deposition  
09:15AM 20 excerpts that have been tendered by the Plaintiff have  
09:15AM 21 also been admitted into evidence.

09:15AM 22 THE COURT: And are those lists included  
09:15AM 23 in your Exhibits 1 through 50?

09:15AM 24 MR. ANDERSON: I -- I don't --

09:15AM 25 MR. GOODMAN: It's a separate --

09:15AM 1 MR. ANDERSON: -- it's a separate -- it's  
09:15AM 2 a separate group of documents that we've -- that we  
09:15AM 3 tendered to the Court yesterday afternoon.

09:15AM 4 THE COURT: Okay. And those are  
09:16AM 5 tendered in hard copy and on a disk?

09:16AM 6 MR. ANDERSON: Yes, Your Honor.

09:16AM 7 THE COURT: Mr. Smith, do you have  
09:16AM 8 receipt of those?

09:16AM 9 MR. SMITH: We do, Your Honor. The  
09:16AM 10 deposition excerpts that we have submitted actually are  
09:16AM 11 complete copies of the deposition with both sides  
09:16AM 12 excerpts included, so we do have those. We have no  
09:16AM 13 objection to the -- to the offer that they've made.

09:16AM 14 THE COURT: In other words, you've  
09:16AM 15 highlighted in some fashion the portions that each side  
09:16AM 16 wants?

09:16AM 17 MR. SMITH: Yes, Your Honor.

09:16AM 18 THE COURT: Okay. Then I trust that's  
09:16AM 19 the answer to your question, Mr. Anderson, but you  
09:16AM 20 might want to have someone on your side verify that, in  
09:16AM 21 fact, your designations are included in what they've  
09:16AM 22 tendered, but --

09:16AM 23 MR. ANDERSON: Will do. Will do so,  
09:16AM 24 Your Honor. I have no reason to suspect that it's  
09:16AM 25 anything other than that.

09:16AM 1 THE COURT: Well, if you find out even  
09:16AM 2 after the hearing that that's true, we can easily  
09:16AM 3 remedy that. But I -- I would like to just look at one  
09:17AM 4 copy of those depositions and if -- if the Defendant  
09:17AM 5 has highlighted both sides' portions on their copies,  
09:17AM 6 then I -- my preference would be to use their copies if  
09:17AM 7 the Plaintiffs don't have the Defendant's highlighted.

09:17AM 8 MR. ANDERSON: We will work with  
09:17AM 9 opposing Counsel to make sure that you just have one  
09:17AM 10 set of deposition excerpts to --

09:17AM 11 THE COURT: Okay. Well, that's good.  
09:17AM 12 If you determine that there's any problem, I think we  
09:17AM 13 can easily remedy it, but we'll proceed in that fashion  
09:17AM 14 and your designated deposition excerpts are admitted as  
09:17AM 15 well.

09:17AM 16 Mr. Scalia?

09:17AM 17 MR. SCALIA: Yes, just a point of  
09:17AM 18 clarification in terms of the order of argument, Your  
09:17AM 19 Honor, you mentioned beginning with 23(a), which  
09:17AM 20 naturally comes before (b). We would regard the waiver  
09:17AM 21 issue itself is part of 23(a), it's a very important  
09:18AM 22 threshold issue relating to the waiver, so --

09:18AM 23 THE COURT: All right.

09:18AM 24 MR. SCALIA: -- that would be our  
09:18AM 25 intention, if it's approved by the Court.

09:18AM 1 THE COURT: Certainly. I definitely  
09:18AM 2 want argument on the waiver issue as well.

09:18AM 3 So I'm willing to start, then. Mr.  
09:18AM 4 Anderson, do you want to --

09:18AM 5 MR. ANDERSON: Yes, Your Honor. Your  
09:18AM 6 Honor, we have a PowerPoint presentation that we have  
09:18AM 7 prepared. I've got copies of the PowerPoint that I'd  
09:18AM 8 like to -- it's purely demonstrative evidence. We're  
09:18AM 9 not in any way alleging that it is evidence, but we'd  
09:18AM 10 like to tender a copy to the Court and to the other  
09:18AM 11 side as well.

09:18AM 12 And I think, understanding what the Court  
09:18AM 13 would like us to do, it's basically the first part of  
09:18AM 14 it is just kind of a background where we talk about  
09:18AM 15 just background elements and then we would proceed with  
09:18AM 16 23(a). And then I -- I take it that at that point we  
09:18AM 17 may, after we are done with our presentation on 23(a),  
09:18AM 18 Mr. Stris has argument with regard to the waiver issue  
09:19AM 19 that is being raised by Mr. Scalia. And so I'll let  
09:19AM 20 Mr. Stris address that particular part of it and then  
09:19AM 21 I'll stop -- we'll stop there and allow them to -- to  
09:19AM 22 argue that issue so then it's before the Court.

09:19AM 23 THE COURT: Okay.

09:19AM 24 MR. STRIS: May I approach, Your Honor?

09:19AM 25 THE COURT: Yes.

09:19AM 1 MR. Stris: One for the Court, one for  
09:19AM 2 you.

09:19AM 3 THE COURT: Let me get copies for  
09:19AM 4 Counsel.

09:19AM 5 MR. SMITH: Your Honor, I -- I apologize,  
09:19AM 6 the Defendant's slide shows only nine slides, but we're  
09:19AM 7 happy to hand them a copy of that as well.

09:19AM 8 MR. SCALIA: Michael, I'm sorry, not  
09:19AM 9 this page.

09:19AM 10 MR. SMITH: Oh, okay.

09:19AM 11 MR. ANDERSON: May it please the Court.  
09:20AM 12 My name is Ted Anderson and I'm speaking on behalf of  
09:20AM 13 the Plaintiffs in both of the class action proceedings  
09:20AM 14 before the Court and we will address all issues  
09:20AM 15 together as we proceed, unless requested otherwise by  
09:20AM 16 the Court.

09:20AM 17 I think the first background point that I  
09:20AM 18 would like to make is to look at the time period and  
09:20AM 19 what was going on at UBS, the Defendant in this case,  
09:20AM 20 back prior to the end of the class period that we  
09:20AM 21 proposed, which was January 1, 2011. And what we know  
09:20AM 22 is that in July of 2007, we asked the Court to take  
09:20AM 23 judicial notice of number 06-405236, NY versus UBS  
09:20AM 24 Financial Services, Inc., the New York Supreme Court,  
09:20AM 25 that there was a announced settlement by UBS that refer



09:21AM 1 -- that pertained to placing inappropriate customers in  
09:21AM 2 fee-based accounts.

09:21AM 3 We know that in August of 2008, which was  
09:21AM 4 truly the advent of the stock market crash during that  
09:21AM 5 time period, the auction rate securities market froze  
09:21AM 6 and became illiquid.

09:21AM 7 THE COURT: Mr. Anderson, which of the  
09:21AM 8 issues on certification do these background facts  
09:21AM 9 relate to?

09:21AM 10 MR. ANDERSON: Your Honor, the -- it  
09:21AM 11 pertains to the issue of whether or not the -- the  
09:21AM 12 PartnerPlus Plan was something that was being operated  
09:21AM 13 as a retirement plan or whether or not it was something  
09:21AM 14 that was designed to give UBS the opportunity to use  
09:21AM 15 beneficiary funds for investments. It also has to do  
09:21AM 16 with the issue as to why it was that there was a mass  
09:22AM 17 exodus of class members during this time period.

09:22AM 18 THE COURT: All right. And the -- and  
09:22AM 19 how does why the class members left, how does that  
09:22AM 20 relate to what I've got to decide?

09:22AM 21 MR. ANDERSON: Well, there have been  
09:22AM 22 issues raised by the Defendants as to whether or not  
09:22AM 23 they were leaving because they were being lured away by  
09:22AM 24 competitors and whether or not and -- and for the  
09:22AM 25 specific purpose as to why the plan was -- was

09:22AM 1 designed. Their experts say in their opinions that the  
09:22AM 2 plans were designed to create deferred income. And we  
09:22AM 3 think that the issue -- the purpose of the plan was to  
09:22AM 4 give them access to PartnerPlus Plan funds.

09:22AM 5 THE COURT: And is that a fact that you  
09:22AM 6 have pled anywhere?

09:22AM 7 MR. ANDERSON: It is a -- the fact that  
09:22AM 8 the PartnerPlus Plan is a retirement plan is a fact  
09:23AM 9 that we have pled.

09:23AM 10 THE COURT: Okay. I -- I mean, the --  
09:23AM 11 the allegation that UBS' purpose was to get access to  
09:23AM 12 these funds for some unrelated purpose.

09:23AM 13 MR. ANDERSON: Your Honor, it goes --  
09:23AM 14 it's -- it's the Defendant's position that it is not a  
09:23AM 15 plan because the purpose is for something -- it's to  
09:23AM 16 create a plan for deferred compensation as opposed to a  
09:23AM 17 retirement plan, which would require that they have a  
09:23AM 18 separate bank account where the funds are isolated and  
09:23AM 19 can't be used for anything other than retirement. And  
09:23AM 20 so it is just a challenge to that.

09:23AM 21 I don't know that it's an issue that has  
09:23AM 22 to be litigated here today, but I was just trying to  
09:23AM 23 suggest to the Court some background information and a  
09:23AM 24 challenge to this issue as to what the purpose of the  
09:23AM 25 PartnerPlus Plan was.

09:24AM 1 THE COURT: Mr. Scalia?

09:24AM 2 MR. SCALIA: I'll just object on  
09:24AM 3 relevance ground, Your Honor, and the fact that this  
09:24AM 4 was not raised previously. I'll note that -- we'll see  
09:24AM 5 its inconsistency, I think, in the course of the  
09:24AM 6 morning. Mr. Anderson just reintroduced the ERISA  
09:24AM 7 issue, which under the circumstances he's fled from.  
09:24AM 8 And finally, I assume there are some limitations on the  
09:24AM 9 amount of time that Plaintiffs will have to make this  
09:24AM 10 presentation and that the extent they wish to dwell on  
09:24AM 11 matters such as this, which strike me as irrelevant,  
09:24AM 12 they will not be afforded extra time to address the  
09:24AM 13 issues that are actually important to us.

09:24AM 14 THE COURT: Well, thank you, Mr. Scalia.

09:24AM 15 Mr. Anderson, I -- I think that this is  
09:24AM 16 highly inflammatory and marginally relevant and I -- I  
09:24AM 17 would ask you to move on to the -- to the issues that I  
09:24AM 18 have to decide at this hearing.

09:24AM 19 MR. ANDERSON: I will, Your Honor.

09:24AM 20 THE COURT: Thank you.

09:24AM 21 MR. ANDERSON: Moving on, I'm going to  
09:25AM 22 move over to Slide No. 4. Basically with regard to the  
09:25AM 23 burden of the class certification, it's -- really the  
09:25AM 24 burden is on Plaintiffs only to establish compliance  
09:25AM 25 with the requirements of Rule 23, that the requirements

09:25AM 1 are met. There's -- there's no discretion to deny  
09:25AM 2 certification and benefit of the doubt is to be given  
09:25AM 3 the certification.

09:25AM 4 I'll move to Rule 23(a) requirements.  
09:25AM 5 First, we -- there are four requirements under Rule  
09:25AM 6 23(a). The class --

09:25AM 7 THE COURT: Let me stop you one minute.  
09:25AM 8 I -- and maybe you have authority for this in your  
09:25AM 9 brief about the benefit of the doubt. That's the only  
09:25AM 10 principle you've mentioned that isn't apparent to me,  
09:25AM 11 it -- and would help me if you could give me a quick  
09:25AM 12 cite on that. That seems to be a little different than  
09:25AM 13 the rigorous analysis requirements that the Supreme  
09:26AM 14 Court has talked about lately.

09:26AM 15 MR. GOODMAN: I'll do that, Your Honor.

09:26AM 16 THE COURT: Okay. See, I always like  
09:26AM 17 these standards when I first give the benefit of the  
09:26AM 18 doubt to something.

09:26AM 19 MR. GOODMAN: Your Honor, may I give you  
09:26AM 20 some citations?

09:26AM 21 THE COURT: Yes.

09:26AM 22 MR. GOODMAN: Recent one in the Northern  
09:27AM 23 District is Hamilton versus First American Title  
09:27AM 24 Insurance Company, 266 F.R.D. 153. Another one from  
09:27AM 25 this Court is a decision, Biwaters versus US, 196

09:27AM 1 F.R.D. 458, which is 2000. So those two decisions are  
09:27AM 2 from 2000 and 2010 respectively citing other cases in  
09:27AM 3 both instances.

09:27AM 4 THE COURT: All right. Thank you.  
09:27AM 5 That's -- that's helpful.

09:27AM 6 MR. ANDERSON: With regard to Rule  
09:27AM 7 23(a), Your Honor, Plaintiffs have to -- have to show  
09:27AM 8 that the class of employees who have been subject to  
09:27AM 9 Defendant's wrongful conduct is so numerous that  
09:27AM 10 joinder of all members is impracticable.

09:27AM 11 Two, that there are questions of fact or  
09:27AM 12 law common to the class.

09:27AM 13 Three, that the claim of the Plaintiffs  
09:27AM 14 is typical of the claim of the class.

09:27AM 15 And four, the Plaintiffs and their  
09:28AM 16 Counsel will fairly and adequately protect the  
09:28AM 17 interests of the class.

09:28AM 18 We then move to Rule 23(b), which I will  
09:28AM 19 postpone for the time being --

09:28AM 20 THE COURT: Yeah.

09:28AM 21 MR. ANDERSON: -- so that we can move on  
09:28AM 22 to really just going through the 23(a) issues. I'm  
09:28AM 23 going to defer to Mr. Stris to address those issues.

09:28AM 24 THE COURT: And frankly, maybe we should  
09:28AM 25 start the analysis with the class definition that's

09:28AM 1 been proposed. I've got some questions about that.

09:28AM 2 And if Mr. Stris is the one to talk about that, then

09:28AM 3 that would be great.

09:28AM 4 MR. ANDERSON: Thank you, Your Honor.

09:28AM 5 MR. STRIS: Good morning, Your Honor.

09:28AM 6 THE COURT: Good morning.

09:28AM 7 MR. STRIS: I'm happy to start there.

09:28AM 8 THE COURT: The one concern I have about

09:28AM 9 the proposed class definition is the second clause in

09:28AM 10 it, basically, that starts: And who are alleged by

09:29AM 11 Defendant to have forfeited. You know, the -- I think

09:29AM 12 the most important part of the class definition is to

09:29AM 13 provide ready notice to the world as to who is in and

09:29AM 14 out and particularly to the putative class members

09:29AM 15 themselves.

09:29AM 16 And so any time the class definition

09:29AM 17 incorporates a legal conclusion that -- that might be

09:29AM 18 hard or absent putative class members to understand, it

09:29AM 19 concerns me. What -- what is the function of -- of

09:29AM 20 that clause in your definition?

09:29AM 21 MR. STRIS: Yeah, I understand certainly

09:29AM 22 where you're coming from. I think it may just be a

09:29AM 23 semantic issue, though. What -- the way we've defined

09:29AM 24 the class was intended to be objective. And so let me

09:29AM 25 explain what I mean by that.

09:29AM 1 The first element, for lack of a better  
09:30AM 2 word, is that we're talking about former employees of  
09:30AM 3 UBS who left before a date certain, January 1st, 2011.  
09:30AM 4 So I think we all can agree that that's objective and  
09:30AM 5 clear.

09:30AM 6 The second element is what I, if I were  
09:30AM 7 just talking in kind of lay parlance, would say our  
09:30AM 8 employees who forfeited money. They left UBS. They  
09:30AM 9 had money that UBS claimed was unvested and they didn't  
09:30AM 10 get it. The reason the language that's used there is  
09:30AM 11 alleged to have forfeited is just in an abundance of  
09:30AM 12 caution; in other words, we don't believe that they  
09:30AM 13 actually forfeited it.

09:30AM 14 But it's really a very straight forward  
09:30AM 15 from a notice perspective, it's really a very straight  
09:30AM 16 forward definition. We're saying number one, you had  
09:30AM 17 to have left before January 1st, 2011. Number two, UBS  
09:30AM 18 had to take the position that you forfeited the money  
09:30AM 19 and you didn't get it. And number three, you had to be  
09:30AM 20 the kind of person where if this was an ERISA plan, the  
09:31AM 21 forfeiture would have been impermissible.

09:31AM 22 THE COURT: Doesn't that require the  
09:31AM 23 putative class members to have some understanding of  
09:31AM 24 what ERISA does? How -- how would they know that if  
09:31AM 25 the plan was governed by ERISA it would not have been

09:31AM 1 forfeitable?

09:31AM 2 MR. STRIS: From a notice perspective  
09:31AM 3 you may be right and it may be unnecessary or  
09:31AM 4 gratuitous. In other words, the -- from a notice  
09:31AM 5 perspective, we're looking to define a class that's  
09:31AM 6 pegged by two markers. You -- you left before January  
09:31AM 7 1st, 2011, number one; and number two, you forfeited  
09:31AM 8 money.

09:31AM 9 The problem is if we only use those two  
09:31AM 10 markers, there may be, and I would -- I confess,  
09:31AM 11 there's probably not enough evidence in the record to  
09:31AM 12 prove this, but my strong instinct, having taken the  
09:31AM 13 30(b)(6) deposition in this case, is that there may be  
09:32AM 14 a very small amount of forfeitures that former  
09:32AM 15 employees of UBS suffered on other grounds.

09:32AM 16 And I'll give you an example, Your Honor.  
09:32AM 17 When I took the deposition, Mr. Levitan explained to me  
09:32AM 18 that you could forfeit money for cause. So you know, I  
09:32AM 19 don't mean to be -- give an -- you know, a salacious  
09:32AM 20 example, but if you left UBS before January 1st, 2011,  
09:32AM 21 and you left because they alleged that you tried to  
09:32AM 22 kill someone, you forfeited -- you would have forfeited  
09:32AM 23 your entitlement and we're not trying to encompass  
09:32AM 24 people like that in the class.

09:32AM 25 So in an abundance of caution, we put



09:32AM 1 this third marker, which is it is someone who forfeited  
09:32AM 2 the money because ERISA's vesting schedule was not  
09:32AM 3 complied with. And I think it's an appropriate class  
09:32AM 4 definition from a -- from a notice perspective, but a  
09:32AM 5 lot of that is going to go to the type of class at  
09:33AM 6 issue here. In other words, maybe the -- maybe the  
09:33AM 7 simplest answer I have to your question is if, as I  
09:33AM 8 believe, a Rule 23(b)(2) class is certified, then it  
09:33AM 9 will make the situation very easy because we'll have  
09:33AM 10 litigation over whether there should be an injunction.  
09:33AM 11 And if an injunction is imposed that prohibits UBS  
09:33AM 12 from, essentially, treating their retirement plan as a  
09:33AM 13 nonretirement plan, then you would get to the issue of  
09:33AM 14 the consequences of that.

09:33AM 15 But I understand your point, Your Honor,  
09:33AM 16 in terms of having a clear definition so that people  
09:33AM 17 know whether they are in or not in the class.

09:33AM 18 THE COURT: Well, can you think of  
09:33AM 19 language that would simply refer to what happened to  
09:33AM 20 their funds that would not involve a conclusion about  
09:33AM 21 how it would have been treated under ERISA?

09:34AM 22 MR. STRIS: Yes. Instead of make --  
09:34AM 23 instead of phrasing it in terms of the legal  
09:34AM 24 conclusion, what we could do is take the discrete  
09:34AM 25 objective words in ERISA and put them in. So it would

09:34AM 1 not -- it would just be much longer.

09:34AM 2 So in other words, the first marker would  
09:34AM 3 be leaving before 2011. The second marker would be  
09:34AM 4 monies forfeited; and the third -- the third marker, I  
09:34AM 5 guess it would link to the second, is forfeited because  
09:34AM 6 the employee -- because the employee participated in  
09:34AM 7 the plan for described time period.

09:34AM 8 In other words, you -- I -- I think -- I  
09:34AM 9 can't do it off-the-cuff, it's a little bit  
09:34AM 10 challenging, but certainly if I had, you know, a half  
09:34AM 11 an hour, I could sit down and rewrite that language so  
09:34AM 12 that instead of being linked to the -- the legal  
09:34AM 13 conclusion, i.e., compliance with ERISA, it would be  
09:34AM 14 linked to an objective standard phrased in terms of  
09:35AM 15 number of years. I think that would entirely solve the  
09:35AM 16 problem that you've described. The downside is it  
09:35AM 17 would be much longer, but you know, we would be happy  
09:35AM 18 to do that.

09:35AM 19 THE COURT: What if it was something  
09:35AM 20 along the lines of and who forfeited some portion of  
09:35AM 21 their PartnerPlus accounts due to the vesting  
09:35AM 22 provisions? I don't know, something...

09:35AM 23 MR. STRIS: Well, I mean, we would have  
09:35AM 24 no problem with that. I'm not sure that it solves the  
09:35AM 25 -- the -- I'm not sure that it completely obviates

09:35AM 1 the --

09:35AM 2 THE COURT: Well, in other words, there  
09:35AM 3 may be people in a putative class who end up not being  
09:35AM 4 entitled to relief or not being entitled to complete  
09:35AM 5 relief, but that's just one of the consequences of a  
09:36AM 6 class action. But I -- in any event, that's a concern  
09:36AM 7 I have. So I'll just leave it out there and that's  
09:36AM 8 something that -- that your side will need to address.

09:36AM 9 I also want to talk about, there's the  
09:36AM 10 issue about the statute of limitations.

09:36AM 11 MR. STRIS: Yes.

09:36AM 12 THE COURT: And you have phrased --  
09:36AM 13 framed this as a class with no beginning date. Is  
09:36AM 14 there some reason that you have done that?

09:36AM 15 MR. STRIS: Yes.

09:36AM 16 THE COURT: Tell me about it.

09:36AM 17 MR. STRIS: So I'm going to answer that  
09:36AM 18 question and it's going to necessarily bleed into some  
09:36AM 19 argumentation on the statute of limitations issue, if  
09:36AM 20 you don't mind.

09:36AM 21 THE COURT: I don't mind.

09:36AM 22 MR. STRIS: Okay. So let me put it this  
09:36AM 23 way, Rule 23(a) there's four requirements. There's  
09:36AM 24 numerosity; everyone agrees that applies here.

09:37AM 25 There's commonality. I think that

09:37AM 1 essentially UBS has conceded that because the case  
09:37AM 2 comes down to three legal issues that apply the same to  
09:37AM 3 everyone.

09:37AM 4 Then we have typicality and adequacy.  
09:37AM 5 And essentially the -- the defense that UBS has put  
09:37AM 6 forward is because of statute of limitations,  
09:37AM 7 in-service distributions, and releases, there's no  
09:37AM 8 adequacy and typicality. So I just want to get that  
09:37AM 9 out there because those are kind of three points of  
09:37AM 10 joinder that I think we'll have to take up today.

09:37AM 11 On the issue of statute of limitations,  
09:37AM 12 we have two distinct arguments and they're going to  
09:37AM 13 relate to the question you just asked me about why we  
09:37AM 14 defined the class the way we did. Our primary argument  
09:37AM 15 is this, Your Honor, we believe that UBS is completely  
09:37AM 16 wrong in terms of their -- their concept of accrual.  
09:37AM 17 In other words, we think they're wrong about when under  
09:37AM 18 ERISA a claim like this accrues.

09:37AM 19 We believe that under the correct accrual  
09:38AM 20 rule, every single class member's claim is timely and  
09:38AM 21 that we essentially can go back to the beginning of the  
09:38AM 22 operation of this plan. So in other words, the plan  
09:38AM 23 was put into place in 1995. If someone forfeited money  
09:38AM 24 in 1996, '97, '98, we believe that all of those claims  
09:38AM 25 are timely.

09:38AM 1 So in other words, we've defined the  
09:38AM 2 class as people who left UBS before 2011 and if our  
09:38AM 3 position on statute of limitations prevails, the class  
09:38AM 4 would go back to the beginning of this plan. And I'll  
09:38AM 5 -- I can get to that argument in a minute, but I -- I  
09:38AM 6 kind of just want to lay out our position first.

09:38AM 7 We have an alternative argument and if we  
09:38AM 8 are -- if we're forced to rely on our alternative  
09:38AM 9 argument, it would admittedly narrow the length of the  
09:38AM 10 class and permit the Court to -- to bind not only the  
09:38AM 11 outer boundary, but the -- the -- the beginning point.  
09:38AM 12 Our alternative argument is that even under the line of  
09:39AM 13 accrual cases that my friend from UBS have cited, which  
09:39AM 14 we think are inapplicable, there's no statute of  
09:39AM 15 limitations problem because the Fifth Circuit has very  
09:39AM 16 clear authority that would establish that the relevant  
09:39AM 17 accrual date in this case would be the point of  
09:39AM 18 forfeiture, so the point at which people left UBS.

09:39AM 19 And again, I'm just previewing. When we  
09:39AM 20 get to the argument, I can address it. But under --  
09:39AM 21 under our alternative argument, the statute of  
09:39AM 22 limitations would run from when people left UBS. And  
09:39AM 23 then we get to the question of, well, what is the  
09:39AM 24 accrual period, if you borrow the -- I'm sorry, what is  
09:39AM 25 the limitations period. So if you borrowed the statute

09:39AM 1 of limitations from each state, which is the position  
09:39AM 2 we would take, and we don't think that that in any way  
09:39AM 3 eliminates the ability of this case to proceed as a  
09:39AM 4 class, you essentially would -- would have a class  
09:39AM 5 defined by X number of years before the lawsuit was  
09:39AM 6 filed, but the X number of years would differ, it would  
09:40AM 7 be three years in the shortest state, to longer periods  
09:40AM 8 in other states.

09:40AM 9 So anyway, I guess the short answer to  
09:40AM 10 your question is we've defined the class the way we  
09:40AM 11 have because we believe under the correct  
09:40AM 12 interpretation of the statute of limitations in this  
09:40AM 13 case, there is no outer boundary. Anyone who forfeited  
09:40AM 14 money under this plan would still have a timely claim  
09:40AM 15 because UBS has consistently denied that this is an  
09:40AM 16 ERISA plan. And so the -- the relevant operative facts  
09:40AM 17 that go to the question of facts and circumstances did  
09:40AM 18 not come out and were not available to any class member  
09:40AM 19 until well into this lawsuit.

09:40AM 20 THE COURT: I think that's a really  
09:40AM 21 tough position to take, that somebody who suffered a  
09:40AM 22 forfeiture well in the past, back longer ago than the  
09:40AM 23 applicable statute of limitations would not have their  
09:41AM 24 limitations period ever start to run if they were not  
09:41AM 25 individually put on notice of the illegality of it.

09:41AM 1 MR. STRIS: Well, I appreciate that,  
09:41AM 2 Your Honor. Could I just be heard for a minute on why  
09:41AM 3 I think, you know, perhaps, although it may be  
09:41AM 4 counterintuitive, why I actually believe it's a correct  
09:41AM 5 statement of the law?

09:41AM 6 THE COURT: Okay.

09:41AM 7 MR. STRIS: Okay. So here's the  
09:41AM 8 argument in a nutshell. This case is about whether or  
09:41AM 9 not PartnerPlus is an ERISA retirement plan, period.  
09:41AM 10 That's what the litigation is going to be about. I  
09:41AM 11 think both sides can agree that that's going to turn on  
09:41AM 12 what I will call the aggregate facts and circumstances  
09:41AM 13 regarding the operation and administration of the plan.  
09:41AM 14 And no Plaintiff has had that information until very  
09:41AM 15 recently. Let me give you some examples.

09:41AM 16 For the first time last month, for the  
09:41AM 17 first time, UBS provided two 100-page internal manuals  
09:41AM 18 which made crystal clear that UBS considered all of the  
09:42AM 19 class members to be retirees. For the first time last  
09:42AM 20 month, UBS began to produce aggregate data on  
09:42AM 21 distributions out of this plan.

09:42AM 22 I can give the -- example after example  
09:42AM 23 after example, but all of them show that there's no  
09:42AM 24 chance that a single member of this class had access to  
09:42AM 25 aggregate information. And that aggregate information

09:42AM 1 is critical because this isn't a typical benefits case,  
09:42AM 2 Your Honor. This isn't a -- isn't a case where you  
09:42AM 3 have an ERISA plan and the fight is over whether you  
09:42AM 4 get benefits under term A, term B, or term C. This  
09:42AM 5 case is about whether the plan is a retirement plan at  
09:42AM 6 all.

09:42AM 7 And since that turns on a whole bunch of  
09:42AM 8 complicated information that was only in the possession  
09:42AM 9 of UBS, it's very much -- it's on all fours with the  
09:42AM 10 Marriott case that we cite. In fact, the Marriott case  
09:42AM 11 is the only case, if you look at every statute of  
09:42AM 12 limitations case that was cited in our briefs and in  
09:43AM 13 their briefs, the only one that has any parallel to  
09:43AM 14 this one is the Marriott case.

09:43AM 15 And the Court in that case made it very  
09:43AM 16 clear that in an unusual circumstance like this where  
09:43AM 17 the plan has said, oh, it's not an ERISA plan, for  
09:43AM 18 years they said this isn't a ERISA plan, the point at  
09:43AM 19 which the -- the individuals are put on notice so that  
09:43AM 20 they actually realize that they have rights is not when  
09:43AM 21 they forfeit money, it's not when they get a plan  
09:43AM 22 document that says, oh, you're going to forfeit money  
09:43AM 23 under this condition, that condition. Because if you  
09:43AM 24 think about it from a common sense standpoint, that  
09:43AM 25 wouldn't bother you if you were a participant in the



09:43AM 1 plan unless you had reason to believe that it was a  
09:43AM 2 retirement plan and that what they were doing was not  
09:43AM 3 permitted.

09:43AM 4 THE COURT: The Marriott case you're  
09:43AM 5 talking about is the Maryland District Court case?

09:43AM 6 MR. STRIS: Yes.

09:43AM 7 THE COURT: Do you have anything that is  
09:43AM 8 more in the chain of controlling authority that -- that  
09:44AM 9 would indicate that this ERISA accrual is to be  
09:44AM 10 interpreted in the way you're arguing?

09:44AM 11 MR. STRIS: No. And the reason I can  
09:44AM 12 say that, and I think UBS will have to stand up here  
09:44AM 13 and tell you that they don't have anything controlling  
09:44AM 14 in the other direction, is because it is a very rare  
09:44AM 15 case like this one where the fight is over whether a  
09:44AM 16 plan is governed by ERISA when that has been denied,  
09:44AM 17 essentially, for a decade.

09:44AM 18 But if you look at the facts of the  
09:44AM 19 Marriott case, there's another case called Hilton, but  
09:44AM 20 it's also not in the right chain of control. I can --  
09:44AM 21 I don't have the cite in front of me, they're the only  
09:44AM 22 two cases, oddly they both involve hotels, but they're  
09:44AM 23 the only two cases I've seen that involve this type of  
09:44AM 24 fact pattern. All of the statute of limitations cases  
09:44AM 25 that UBS is citing, and I would like to just sort of

09:44AM 1 briefly touch upon this, they're from an entirely  
09:44AM 2 different context. And I have tons of authority that  
09:44AM 3 I'd like to provide that's not necessarily in the  
09:45AM 4 papers that would show that the outer boundary has to  
09:45AM 5 be the forfeiture.

09:45AM 6 So for example, the Fifth Circuit has  
09:45AM 7 made clear, Your Honor, in an unbroken line of cases  
09:45AM 8 that I can provide --

09:45AM 9 THE COURT: You know, I -- the -- the  
09:45AM 10 fact that the forfeiture would be the logical starting  
09:45AM 11 point is something that -- that I have believed all  
09:45AM 12 along in this. But -- so you don't need to provide  
09:45AM 13 those citations at this point, although I may ask you  
09:45AM 14 later to comment on ones that UBS offers.

09:45AM 15 But I'm -- both sides seem to agree that  
09:45AM 16 this question of accrual of the cause of action is  
09:45AM 17 governed by federal law in this case.

09:45AM 18 MR. STRIS: That's correct.

09:45AM 19 THE COURT: And so tell me what -- what  
09:45AM 20 is your best case, other than Marriott, which I  
09:45AM 21 understand the position on, that your best case out of  
09:46AM 22 the Fifth Circuit of the Supreme Court that would  
09:46AM 23 indicate that -- that your argument is right?

09:46AM 24 MR. STRIS: Well, I mean, not -- not to  
09:46AM 25 be flip, but this is a developing area of the law. I'm

09:46AM 1 litigating a case right now before the U.S. Supreme  
09:46AM 2 Court called Heimeshoff. The Court just granted it.  
09:46AM 3 It's going to get argued next term. I represent the  
09:46AM 4 Plaintiffs in that case. And it's about the --  
09:46AM 5 literally it's about the accrual of statutes of  
09:46AM 6 limitation under ERISA. And there's huge -- a huge  
09:46AM 7 circuit split, which is what led to the Court taking  
09:46AM 8 the case, in the benefits context; in other words, an  
09:46AM 9 ERISA 502(a)(1)(b) context about under federal law when  
09:46AM 10 a claim accrues. And there's case after case after  
09:46AM 11 case about different issues in that context.

09:46AM 12 If I'm being candid, which of course I  
09:46AM 13 have to be with the Court, this -- this is a very  
09:46AM 14 unusual case because it's not a benefits case. It's a  
09:46AM 15 case where we're -- we're seeking an injunction and  
09:47AM 16 reformation under 502(a)(3).

09:47AM 17 THE COURT: Well, so let's not -- let's  
09:47AM 18 take it beyond the ERISA area, if you say that you  
09:47AM 19 don't have something close there. Under federal law on  
09:47AM 20 accrual generally, have you got something that deals  
09:47AM 21 with a situation where the Defendant did some act which  
09:47AM 22 caused the Plaintiffs' claims not to accrue? In other  
09:47AM 23 words, that seems to be what your relying upon --

09:47AM 24 MR. STRIS: Yeah. Yeah. So let me  
09:47AM 25 answer the question this way, because I don't have the

09:47AM 1 citation in front of me. There's a long line of cases  
09:47AM 2 I think both inside and outside the ERISA context about  
09:47AM 3 what I would call fraud or equitable estoppel or  
09:47AM 4 various types of estoppel where essentially the cases  
09:47AM 5 talk about when the Defendants' conduct essentially  
09:47AM 6 involves concealment and the Plaintiffs could not have  
09:47AM 7 been aware of the operative facts because of the  
09:47AM 8 Defendants' conduct. Either the claim does not accrue  
09:48AM 9 for statutory -- statute of limitations purposes or  
09:48AM 10 it's equitably tolled.

09:48AM 11 THE COURT: I don't think I've heard  
09:48AM 12 anything that would indicate to me concealment here.  
09:48AM 13 You're -- they're simply characterizing it one way  
09:48AM 14 and -- and you the other. I think that the  
09:48AM 15 representatives were experiencing the facts about it.  
09:48AM 16 I -- is there any form of concealment that -- that  
09:48AM 17 you've --

09:48AM 18 MR. STRIS: I --

09:48AM 19 THE COURT: -- shown?

09:48AM 20 MR. STRIS: -- I was very careful in the  
09:48AM 21 way I put this because I -- I do not want to get up  
09:48AM 22 here and take the position that there was concealment.  
09:48AM 23 That -- that's not my position.

09:48AM 24 THE COURT: Okay.

09:48AM 25 MR. STRIS: I think your

09:48AM 1 characterization is more accurate. But here's why I'm  
09:48AM 2 struggling, because I really do believe we're right on  
09:48AM 3 the law, but I'm struggling with your question about  
09:48AM 4 authority and I really want to be clear why.

09:48AM 5 It is a rare case where you have the  
09:48AM 6 entire dispute over -- being over whether or not based  
09:48AM 7 on the facts and circumstances of the operation of a  
09:49AM 8 pension plan it -- it constitutes as a -- as a  
09:49AM 9 retirement plan. So that's why the Marriott case is  
09:49AM 10 unusual because it's on all fours, as I believe the --  
09:49AM 11 the Hilton case is also pretty close.

09:49AM 12 When you're asking the questions about,  
09:49AM 13 well, are there other authorities, the best I can do is  
09:49AM 14 tell you that by analogy there's a -- there's a whole  
09:49AM 15 line of cases both inside and outside the context of  
09:49AM 16 ERISA that deal with equitable tolling and estoppel and  
09:49AM 17 concealment. They are not on all fours. I absolutely  
09:49AM 18 agree with you, but they're the best parallel that I  
09:49AM 19 can draw to show why the principle that's set forth in  
09:49AM 20 Marriott, even though it doesn't come up that often, is  
09:49AM 21 governing here.

09:49AM 22 THE COURT: So what I'm gathering is you  
09:49AM 23 don't have any authority for the proposition that the  
09:49AM 24 Defendant's characterization of the plan in a certain  
09:49AM 25 way would keep the Plaintiffs' claims from accruing?

09:50AM 1 MR. STRIS: That -- that's correct. I  
09:50AM 2 don't have any cases, and I feel very strongly that  
09:50AM 3 although they may tell you otherwise, there's not a  
09:50AM 4 single case that UBS is going to cite that would --  
09:50AM 5 that would negate my proposition. The -- the bottom --  
09:50AM 6 and the reason is simple. Facts and circumstances on  
09:50AM 7 which I have a lot of authority, I have cases, I have  
09:50AM 8 DOL opinion letters I can cite at you, it is an  
09:50AM 9 extraordinarily fact-bound test and it's based on  
09:50AM 10 aggregate factors. It's not based on the individual  
09:50AM 11 knowledge of a particular plan.

09:50AM 12 THE COURT: Of course, if -- if I find  
09:50AM 13 that the forfeiture is the event that would commence  
09:50AM 14 the running of the statute, then I think it's going to  
09:50AM 15 be incumbent on you to show that there's some reason  
09:50AM 16 why that claim did not accrue at that time. So I -- I  
09:50AM 17 don't -- whether or not they can show me authority to  
09:50AM 18 the contrary, I think -- think it's your burden --

09:50AM 19 MR. STRIS: Oh, no doubt.

09:51AM 20 THE COURT: -- on this issue.

09:51AM 21 MR. STRIS: I agree -- I agree with you  
09:51AM 22 and I've stated what our legal argument is and I've --  
09:51AM 23 and in terms of authority, I've cited the Marriott  
09:51AM 24 case, which literally goes through and explains the  
09:51AM 25 basis. You've asked me a very fair question and I just

09:51AM 1 want to be candid. You've asked is there any other  
09:51AM 2 authority and I've told you no, but that doesn't mean  
09:51AM 3 I'm wrong. That just means that this rare issue only  
09:51AM 4 came up in one setting and for that reason, Your Honor,  
09:51AM 5 I think it's very important that UBS will not be able  
09:51AM 6 to point to a contrary case because what that means is  
09:51AM 7 we have a sample size of one, actually one-and-a-half  
09:51AM 8 because the Hilton case is the next closest, and if out  
09:51AM 9 of the sample size of one-and-a-half, Courts have sided  
09:51AM 10 with my argument one-and-a-half times, I think that's  
09:51AM 11 the best one could ask me to do, given that it's a very  
09:51AM 12 idiosyncratic fact pattern.

09:51AM 13 THE COURT: I have not studied the  
09:51AM 14 Marriott case yet, but I -- I certainly will do that.  
09:51AM 15 But if you have -- let's go ahead and get any other  
09:51AM 16 argument you have on the statute of limitations issue  
09:52AM 17 and then I'll let UBS respond to that before we move  
09:52AM 18 on.

09:52AM 19 MR. STRIS: Okay. So I -- I think it's  
09:52AM 20 very important we've -- we've kind of gone down the  
09:52AM 21 road of our primary argument and whether it's accepted  
09:52AM 22 or not, I feel comfortable that we've at least gotten  
09:52AM 23 our position out there so that you understand where  
09:52AM 24 we're coming from.

09:52AM 25 What I'd like to do now is explain our

09:52AM 1 fallback position, because I've spent most of the time  
09:52AM 2 in the briefing on our primary position and I really  
09:52AM 3 want to make sure that our fallback position is clear.

09:52AM 4 THE COURT: Okay.

09:52AM 5 MR. STRIS: The Fifth Circuit has an --  
09:52AM 6 and here I have tons of authority, that in an unbroken  
09:52AM 7 line of cases, case after case after case, the Fifth  
09:52AM 8 Circuit, unlike others, because I believe there's a  
09:52AM 9 Circuit split on this question, has made clear that an  
09:52AM 10 ERISA claim cannot accrue for limitations purposes  
09:52AM 11 prior to the actual denial of payment by the plan.

09:52AM 12 And the case I'd like to cite, just as  
09:52AM 13 the paradigmatic example, is Paris versus Profit  
09:52AM 14 Sharing Plan For Employees Of Howard B. Wolf, Inc.  
09:53AM 15 That's 637 F.2d 357. It's a 1981 Fifth Circuit case  
09:53AM 16 and the pin cite is page 361. And I'd like to quote  
09:53AM 17 from the opinion, because it really makes clear the  
09:53AM 18 problem with UBS' position.

09:53AM 19 The Fifth Circuit said, and I quote: To  
09:53AM 20 hold otherwise would put an almost intolerable burden  
09:53AM 21 on employees covered by pension plans. It would  
09:53AM 22 require individuals who are unversed in the law to be  
09:53AM 23 constantly vigilant.

09:53AM 24 And so as a result in the context from  
09:53AM 25 which UBS is citing all of their cases, because all of



09:53AM 1 their cases are from what I believe is an irrelevant  
09:53AM 2 context, but if we want to look at their accrual  
09:53AM 3 context and take their cases at face value, then I  
09:53AM 4 would point the Court to this unbroken line of Fifth  
09:53AM 5 Circuit cases that says it doesn't matter if a  
09:53AM 6 Plaintiff might have had reason to know in advance that  
09:53AM 7 it -- that its benefits were going to be denied. It  
09:53AM 8 doesn't matter. The claim doesn't begin to accrue in  
09:54AM 9 the Fifth Circuit under ERISA until the money is taken  
09:54AM 10 away from them.

09:54AM 11 And I'll cite you two examples that  
09:54AM 12 are -- that are clearly on all fours. There's the Rice  
09:54AM 13 case, it's Rice versus Asbestos Workers Pension And  
09:54AM 14 Annuity Fund. It's an Eastern District of Louisiana  
09:54AM 15 case from 1994. 1994 Westlaw 462983 that was affirmed  
09:54AM 16 by the Fifth Circuit -- I'm sorry, it was affirmed by  
09:54AM 17 the Fifth Circuit in 1991, it's 66 F.3d 521.

09:54AM 18 And then there's the Kennedy case.  
09:54AM 19 Kennedy versus Electricians Pension Plan, which was  
09:54AM 20 affirmed by the Fifth Circuit in 1992. 954 F.2d 1116.  
09:54AM 21 It came up from the Middle District of Louisiana.

09:54AM 22 Case after case after case out of the  
09:54AM 23 Fifth Circuit made clear that a clear repudiation is  
09:54AM 24 not when you have some reason to believe that the plan  
09:54AM 25 will deny you benefits in the future, it's when you

09:54AM 1 don't get your money. So if UBS is going to hold my  
09:54AM 2 feet to the fire and say, well, that's the relevant  
09:55AM 3 context, we should be looking at statute of limitations  
09:55AM 4 cases in that area, then I think, you know, we really  
09:55AM 5 have them dead to rights because the law in the Fifth  
09:55AM 6 Circuit couldn't be any clearer.

09:55AM 7 Now, my friends try and get away from  
09:55AM 8 that with one single footnote in their brief where they  
09:55AM 9 say, oh, well, but this isn't a benefits case. They  
09:55AM 10 say -- they try and sort of hoist me by my own petard  
09:55AM 11 and they say, well, the -- the Plaintiffs have said,  
09:55AM 12 look, we're not seeking benefits and we're challenging  
09:55AM 13 the plan. So all of this authority, implicitly their  
09:55AM 14 argument goes from the Fifth Circuit, in the benefits  
09:55AM 15 context is irrelevant.

09:55AM 16 That argument can't be right because all  
09:55AM 17 of the cases that they cite for the statute of  
09:55AM 18 limitations are precisely from that context. So they  
09:55AM 19 can't have it both ways. Either I get to make my merit  
09:55AM 20 out argument and say all of their cases are irrelevant  
09:55AM 21 because this is a rare case that, like Marriott,  
09:55AM 22 involves whether this was an ERISA plan at all or we  
09:56AM 23 look at case -- in which case, you know, the -- it's  
09:56AM 24 not the forfeiture that we peg things to, it's a much  
09:56AM 25 longer period we get to bring the claim or we look in

09:56AM 1 the context where they don't want you to look and then  
09:56AM 2 you have an unbroken line of Fifth Circuit cases that  
09:56AM 3 would make crystal clear that the accrual cannot occur  
09:56AM 4 until the money is forfeited. That's fundamentally our  
09:56AM 5 alternative position.

09:56AM 6 THE COURT: All right. Thank you. Let  
09:56AM 7 me hear from the Defendant on that issue.

09:56AM 8 MR. SCALIA: Your Honor, just a few  
09:56AM 9 introductory comments on the case in response to Mr.  
09:56AM 10 Henderson.

09:57AM 11 THE COURT: All right.

09:57AM 12 MR. SCALIA: Your Honor, my judgment,  
09:57AM 13 this is an exceptional case where people whose claims  
09:57AM 14 are time-barred are seeking to bring a claim. They're  
09:57AM 15 people who, in some instances have released claims, are  
09:57AM 16 seeking to bring the claims and indeed the people where  
09:57AM 17 every named Plaintiff, all of them uniformly, have  
09:57AM 18 waived the ability to proceed as a class are  
09:57AM 19 nonetheless seeking to bring their case as a class and  
09:57AM 20 they're not claiming unconscionability. They're not  
09:57AM 21 claiming duress.

09:57AM 22 These are extremely sophisticated people,  
09:57AM 23 sophisticated specifically in the area of financial  
09:57AM 24 management. And they concede they signed a waiver and  
09:57AM 25 yet, nonetheless, they're seeking to bring a class for

09:57AM 1 hundreds and in fact, nearly 2000 people. They're  
09:57AM 2 doing so more of, Your Honor, entirely in the face of  
09:57AM 3 Supreme Court precedent and you've already gotten a  
09:57AM 4 taste of that this morning.

09:57AM 5 The Supreme Court in the Dukes, the  
09:57AM 6 Comcast case and others has been emphatic on a number  
09:57AM 7 of things. First, that certification is too involved,  
09:57AM 8 a rigorous analysis. Second, that Plaintiffs must  
09:58AM 9 affirmatively demonstrate their entitlement to  
09:58AM 10 certification. And as the Court said in Dukes, that  
09:58AM 11 they must do so through proof of facts, both of those  
09:58AM 12 are quotes, showing that certification is justified.

09:58AM 13 The Supreme Court has said as well that  
09:58AM 14 proceeding on a class base is the exception, not the  
09:58AM 15 norm. And Your Honor, on the waiver form, we'll come  
09:58AM 16 to it later I realize, we're not saying they can't seek  
09:58AM 17 to vindicate there for legal rights. We're simply  
09:58AM 18 saying they've waived the ability to proceed as a  
09:58AM 19 class.

09:58AM 20 To read their briefs, Your Honor, and to  
09:58AM 21 hear a little bit of their argument here this morning  
09:58AM 22 is to enter a class action case law time warp where  
09:58AM 23 Dukes, Comcast and other cases are lost. And instead,  
09:58AM 24 as you've heard earlier, you got reliance upon, with  
09:58AM 25 all respect, District Court cases that preceded Dukes.

09:58AM 1 The two cases that were cited to you by Mr. Anderson,  
09:58AM 2 as I think you observed, were both prior to Dukes in  
09:58AM 3 2011. They were obviously both prior to Comcast in  
09:58AM 4 2013.

09:58AM 5 There is no when in doubt, certify the  
09:58AM 6 class and off to the races test. The Supreme Court  
09:59AM 7 made very clear on Dukes that's not what's done and to  
09:59AM 8 the extent that those District Court cases said so,  
09:59AM 9 they're simply wrong.

09:59AM 10 Just another observation on the general  
09:59AM 11 class action law applicable here. Your Honor, no one  
09:59AM 12 would dispute that Dukes is the single most important  
09:59AM 13 class action decision in years, if not decades. I  
09:59AM 14 think decades.

09:59AM 15 THE COURT: Well, I mean, Dukes, you're  
09:59AM 16 talking about exceptional cases. Dukes was probably  
09:59AM 17 the most exceptional class action there ever was and  
09:59AM 18 certainly the fact that the Supreme Court was  
09:59AM 19 confronted with that, I think has a lot to do with that  
09:59AM 20 opinion. Now, I -- and it's to me is mind boggling  
09:59AM 21 to -- to see what the 9th Circuit had let through  
09:59AM 22 there.

09:59AM 23 But I don't take the Dukes case as  
09:59AM 24 changing Rule 23 in any significant way. I think it  
09:59AM 25 was a reminder to the District Courts that there is a

10:00AM 1 need to rigorously examine the requirements of Rule 23  
10:00AM 2 and -- and see that class actions hold to it. But  
10:00AM 3 other than that, I don't think it was a game changer.

10:00AM 4 Now, admittedly it did talk about one  
10:00AM 5 thing in some detail and that -- that happens to be at  
10:00AM 6 issue here and that's whether or not monetary damages  
10:00AM 7 should be deemed incidental to injunctive relief. I --  
10:00AM 8 it happened to have quite a lot to say about that,  
10:00AM 9 which is a big issue in this case. But other than  
10:00AM 10 that, I don't see it as -- as having changed the  
10:00AM 11 overall analysis of Rule 23 and maybe you can clarify  
10:00AM 12 that for me.

10:00AM 13 MR. SCALIA: Your Honor, I would  
10:00AM 14 characterize it as substantially clarifying both as to,  
10:00AM 15 as you point out, the way (b)(2) functions, but also,  
10:00AM 16 for example, as to commonality and as to the role of  
10:01AM 17 the merits at the class certification stage and I want  
10:01AM 18 to comment on that briefly. Because whatever one  
10:01AM 19 thinks of Dukes, it is the touchstone now, a starting  
10:01AM 20 point for understanding class action law. And yet,  
10:01AM 21 Plaintiffs cite it once and they get it wrong because  
10:01AM 22 they say that Duke held that incidental damages under  
10:01AM 23 (b)(2) are correct. Again, we can come to that later.

10:01AM 24 That was not Dukes holding. It was very  
10:01AM 25 clear it wasn't approving that. And what Duke said was

10:01AM 1 we have this opinion, it's called Eisen. We've had  
10:01AM 2 District Courts mistakenly suppose that it prevents a  
10:01AM 3 court from touching upon merits issues. That is not  
10:01AM 4 what Eisen said the Supreme Court said. This is  
10:01AM 5 footnote 6 in Dukes. Please don't use Eisen in that  
10:01AM 6 way and if that weren't enough, they came back in  
10:01AM 7 Comcast and they said the same thing again, that's not  
10:01AM 8 what Eisen means. And yet, what is the class action  
10:01AM 9 case that they led with in their opening brief? It's  
10:01AM 10 Eisen.

10:01AM 11 And so my point is it's a time warp plan.  
10:01AM 12 My larger point, Your Honor, is you've been presented  
10:02AM 13 with an approach toward class action law that is  
10:02AM 14 unreliable and the case they put before you is  
10:02AM 15 ultimately unsustainable.

10:02AM 16 If I could turn then, Your Honor, to the  
10:02AM 17 statute of limitations issue specifically.

10:02AM 18 THE COURT: Yes.

10:02AM 19 MR. SCALIA: Our position is all the  
10:02AM 20 Plaintiffs' claims are barred by the applicable statute  
10:02AM 21 of limitations. And accordingly, they are both  
10:02AM 22 inadequate class representatives and the case simply  
10:02AM 23 can't proceed as a class for that reason because their  
10:02AM 24 own claims can't proceed.

10:02AM 25 THE COURT: It -- it's -- it's hard for

1 me to conceive that the Court would hold and I -- I  
2 don't care whether we're talking about the Fifth  
3 Circuit or the Supreme Court in this context, would  
4 hold that if a Defendant puts out a plan that violates  
5 ERISA and nobody challenges it or an individual  
6 employee doesn't challenge it for his first four years  
7 of employment, taking the Texas statute, that he's  
8 thereafter barred from objecting when he's later  
9 injured by it.

10 MR. SCALIA: Your Honor, three responses  
11 to that. First, they're not making that argument until  
12 just now. And I mentioned, when I began this morning,  
13 how Plaintiffs keep changing their arguments. We hear  
14 different things. There were a number of cases cited  
15 by Mr. Stris and these certain specifical affirmative  
16 arguments that weren't made in their briefs and that we  
17 respectively submit are waived accordingly. Only now  
18 did Mr. Stris stand before you and take the position  
19 that is what he called a fallback, the limitations  
20 purely began with the forfeiture. But Your Honor, he  
21 didn't take that position in either of his briefs.  
22 It's waived. It's too late now.

23 But secondly, Your Honor, it's important  
24 to understand the nature of their claim. They quite  
25 consciously are suing, attacking the plan terms and



10:04AM 1 saying the plan terms need to be changed. That also is  
10:04AM 2 a litigation choice they made and they must be held to  
10:04AM 3 and they made it for a reason. So if you look, for  
10:04AM 4 example, at page 7 of their opposition brief, and it's  
10:04AM 5 in their complaint, too, they say -- I'm sorry, this is  
10:04AM 6 their opening brief, they say they're suing over things  
10:04AM 7 that are, quote, expressed as terms of the plan. They  
10:04AM 8 say they're suing, quote, because the plan uses illegal  
10:04AM 9 terms, end quote.

10:04AM 10 Your Honor, if I could, and I apologize  
10:04AM 11 that I am not as technologically as adept as I'd hoped  
10:04AM 12 to be, but I would like to provide you and provide the  
10:04AM 13 Plaintiffs as well what was intended to be a PowerPoint  
10:04AM 14 and instead will be a piece of paper.

10:04AM 15 But what it shows, Your Honor, and this  
10:04AM 16 is an account statement of Mr. Eddingston, which is  
10:04AM 17 outside the four year limitations period.

10:04AM 18 THE COURT: And I know you did refer to  
10:04AM 19 that in your briefs and I'm -- I'm happy to look at it  
10:05AM 20 here, but I -- I understand what you're saying, that --  
10:05AM 21 that he was --

10:05AM 22 COURTROOM DEPUTY: Michael, on the  
10:05AM 23 podium.

10:05AM 24 THE COURT: -- the button is actually up  
10:05AM 25 on the podium there in front of Mr. Scalia. So you're

10:05AM 1 more technologically adept than you realized.

10:05AM 2 MR. SCALIA: It might be easier if we  
10:05AM 3 simply hand it up, Your Honor.

10:05AM 4 COURTROOM DEPUTY: It's the document --  
10:05AM 5 do you see the button?

10:05AM 6 MR. SCALIA: I don't have a document  
10:05AM 7 number in front of me, it's in the reference, but I  
10:05AM 8 don't have that document in front of me. Please, I  
10:05AM 9 think it will be easier just to hand it up. May we  
10:05AM 10 simply hand it up to you, Your Honor?

10:05AM 11 THE COURT: You may. That's not going  
10:06AM 12 to stop Ms. Andrews from fixing it, though.

10:06AM 13 MR. SCALIA: There we are. So Your  
10:06AM 14 Honor, this is an account statement received by Mr.  
10:06AM 15 Eddington, produced by him in discovery. And what  
10:06AM 16 we've highlighted is all of those years showing that he  
10:06AM 17 was not vesting as ERISA would vest you.

10:06AM 18 What ERISA says is that currently you  
10:06AM 19 need to, if it's so-called cliff vesting, you need to  
10:06AM 20 fully cliff vest after three years in the plan. And by  
10:06AM 21 the way after that, each contribution you're fully  
10:06AM 22 vested. And so once you're in the plan three years  
10:06AM 23 under cliff vesting, you're in for good for all future  
10:06AM 24 contributions.

10:06AM 25 Under graduated vesting under current

1 law, you start at year two at 20 percent and proceed at  
2 20 percent increments through year six till you're  
3 fully vested. What this shows is that in those years,  
4 even under a more generous five year cliff vesting  
5 approach that existed until 2006, there were multiple  
6 years where this man was on notice that he was not  
7 vesting according to ERISA. And again, they're suing  
8 over the plan terms.

9 Your Honor, they had access to these  
10 plans. They received a compensation plan document,  
11 which was not simply a brochure; it actually governed  
12 the terms of their compensation. You saw this before  
13 in the prior hearing, Your Honor, I don't know if you  
14 recall, but Plaintiffs' argument to you was that that  
15 document was just a summary and of no force and effect.  
16 But what is handed up to you and you looked at it, it  
17 was 20 pages long. You acknowledged at the hearing  
18 that it seemed like a very substantial document and not  
19 merely a fleeting summary. In fact, it determines  
20 their compensation, including the inputs into  
21 PartnerPlus and on the face of it, that document also  
22 made clear that the vesting was slow, not at the ERISA  
23 pace.

24 So to come to first principles, Your  
25 Honor, the Jenson V. Snelling case, which unlike a

10:07AM 1 number of cases you heard about a moment ago is cited  
10:07AM 2 in our brief, but it's also a very familiar basic  
10:08AM 3 principle. And here in civil law there's no excuse and  
10:08AM 4 a claim accrues upon knowledge of the relevant facts,  
10:08AM 5 not upon knowledge of the law.

10:08AM 6 Mr. -- the Plaintiffs in their brief have  
10:08AM 7 relied upon this Marriott case for the extraordinary  
10:08AM 8 proposition that your claim doesn't accrue until you  
10:08AM 9 file the complaint. We're accustomed to thinking of a  
10:08AM 10 statute of limitations period as something that  
10:08AM 11 precedes the filing of the complaint, but their  
10:08AM 12 argument is that until you file the complaint, the  
10:08AM 13 limitation period doesn't -- doesn't even begin.

10:08AM 14 THE COURT: Is that what -- what is your  
10:08AM 15 understanding of the holding in the Marriott?

10:08AM 16 MR. SCALIA: My understanding of the  
10:08AM 17 holding in that case is twofold. First, it's wrong.  
10:08AM 18 The -- the Court there took this position and, Your  
10:08AM 19 Honor, it said we know it's anomalous to suggest that  
10:08AM 20 the limitations period doesn't begin until you file the  
10:08AM 21 complaint. Your Honor, it's as if -- it's as if  
10:09AM 22 instead of a statute of limitations we've got a statute  
10:09AM 23 of limitless extensions. That it doesn't begin to run,  
10:09AM 24 and the Plaintiffs even suggest this in their brief,  
10:09AM 25 until you file your complaint or afterward. You heard

10:09AM 1 a moment ago that it actually doesn't even begin to run  
10:09AM 2 until you get certain discovery in the case. Well,  
10:09AM 3 that makes no sense.

10:09AM 4 Here's another way of looking at it, Your  
10:09AM 5 Honor. They can't dispute that the plan terms they're  
10:09AM 6 suing over now they could have sued over way back when  
10:09AM 7 in 1998 or 1999. Given that, the claim must have  
10:09AM 8 accrued. Now, that caused Mr. Stris to fall back on  
10:09AM 9 suggestions of fraud, which he then backed away from.  
10:09AM 10 And then he looked at equitable estoppel, which was not  
10:09AM 11 in their briefs.

10:09AM 12 And so this theory in the Marriott case  
10:09AM 13 which, as he acknowledges is absolutely unprecedented,  
10:09AM 14 is simply wrong. And in fact the Marriott report said,  
10:09AM 15 hey, we know it's a bit anomalous.

10:09AM 16 THE COURT: So --

10:09AM 17 MR. SCALIA: And secondly --

10:09AM 18 THE COURT: -- you don't disagree with  
10:09AM 19 his characterization of what the Court held, you would  
10:09AM 20 simply say it's -- it's wrong?

10:10AM 21 MR. SCALIA: Secondly, actually, I -- I  
10:10AM 22 do disagree with aspects of it. What the Court said  
10:10AM 23 there was that it had a very unusual case and it  
10:10AM 24 identified certain specific facts. For example, and  
10:10AM 25 I'm looking at page 772, he said that the retirement

10:10AM 1 awards did not even mention ERISA.

10:10AM 2 Well, Your Honor the PartnerPlus Plan,  
10:10AM 3 which the Plaintiffs all had access to, did  
10:10AM 4 specifically say from 2004 forward that it wasn't an  
10:10AM 5 ERISA a plan, so it did specifically mention ERISA.

10:10AM 6 Second point, the Judge in the Marriott  
10:10AM 7 case said that the employer, quote, did not indicate  
10:10AM 8 how participants could be apprised of plan amendments,  
10:10AM 9 quote. Well, these very sophisticated financial  
10:10AM 10 advisors in this case were told in that compensation  
10:10AM 11 plan document, which determined and summarized a  
10:10AM 12 variety of different elements in their compensation,  
10:10AM 13 they weren't told where to find the PartnerPlus  
10:11AM 14 document.

10:11AM 15 Third, he said there were no details  
10:11AM 16 regarding any claim procedures in the Marriott case.  
10:11AM 17 Your Honor, here there are claims procedures. And --  
10:11AM 18 and then he says summary plan descriptives were never  
10:11AM 19 provided to Plaintiffs. That claim isn't made here.  
10:11AM 20 Again, they received the compensation plan which did  
10:11AM 21 describe the Plaintiffs.

10:11AM 22 So the England Marriott case which they  
10:11AM 23 rely upon is, as they conceive, an anomaly, an outlier,  
10:11AM 24 and not factually aligned with this case on a number of  
10:11AM 25 different dimensions.

10:11AM 1 And another case that I do want to  
10:11AM 2 mention, Your Honor, because I want to talk about the  
10:11AM 3 accrual understanding that's set forth in our papers,  
10:11AM 4 is a case that, candidly, I disagree with in important  
10:11AM 5 ways, but it's one of their very lead cases. This is  
10:11AM 6 the Seventh Circuit, Judge Posner, Johnson case.

10:11AM 7 Now, Judge Posner is not always a  
10:11AM 8 reliable guy to class certification requirements;  
10:11AM 9 however, here is what one of their principle cases says  
10:12AM 10 regarding accrual. This is at page 370. An ERISA  
10:12AM 11 claim accrues when the Plaintiff knows or should know  
10:12AM 12 of conduct that interferes with the Plaintiffs' ERISA  
10:12AM 13 rights.

10:12AM 14 And then the Judge, Judge Posner, of  
10:12AM 15 course, the -- for the unanimous Seventh Circuit talked  
10:12AM 16 about how a summary plan description apprising one of  
10:12AM 17 the plan terms that they're subject to the suit could  
10:12AM 18 itself trigger a clear repudiation and therefore an  
10:12AM 19 ability to sue and therefore trigger the limitations  
10:12AM 20 period.

10:12AM 21 Your Honor, this is just one of a number  
10:12AM 22 of different cases that establish this principle that  
10:12AM 23 we've cited in our briefs. Again, I -- I'm not going  
10:12AM 24 to be able to catch up with every case that Plaintiffs  
10:12AM 25 are giving you now, didn't give in the briefs, but we

1 cited the Union Pacific case, Tenth Circuit. Hurt,  
2 Second Circuit. Berry, Second Circuit.

3 The Balillo case, which I think although  
4 it's a District Court decision out of New York, Your  
5 Honor, it's striking and here's why. Because ERISA  
6 plans are complicated. Whether or not something is an  
7 ERISA plan, that may be a complicated question although  
8 I would submit it's generally not and it's not here.  
9 But how a cash balance plan works, how the whipsaw  
10 requirements associated with cash balance plans work,  
11 how the wear-away principle works, those things are  
12 complicated. And this case, as in the Johnson case  
13 which the Plaintiffs rely on, concerned those  
14 principles.

15 So the idea that, oh, well, ERISA  
16 requires you to know, I think the term was, an  
17 aggregation of facts and circumstances and somehow that  
18 makes it different. Well, these cases didn't regard it  
19 as different. And consider that principle and  
20 transpose it to other areas of law, because I begin  
21 with the first principle. The limitations period  
22 begins knowing facts, not knowing the law. The  
23 ignorance of the law is no excuse. The limitations  
24 period doesn't depend on that.

25 And so again, Plaintiffs think they have



10:14AM 1 a complicated case here. We think they have a case  
10:14AM 2 that's clearly flawed because this was clearly a  
10:14AM 3 deferred compensation plan. But we're not an antitrust  
10:14AM 4 law. Aren't -- isn't there an aggregation of facts  
10:14AM 5 that you need to know to understand when you've  
10:14AM 6 actually suffered antitrust injury?

10:14AM 7 What about Title 7 law? Again, consider  
10:14AM 8 the Dukes case, Your Honor. Nobody there was  
10:14AM 9 considering that nobody had a discrimination claim  
10:14AM 10 until there was discovery in that case whereby you  
10:14AM 11 could know of the pattern and practice of alleged  
10:14AM 12 discrimination in Wal-Mart. So that avenue that  
10:14AM 13 they're urging to the Court is a road to an absolutely  
10:14AM 14 radically different approach toward limitations period  
10:14AM 15 that has no support even in the ERISA case law, but  
10:14AM 16 would not be limited to the ERISA case law either.  
10:14AM 17 It's simply a mistake.

10:14AM 18 THE COURT: Well, how has an employee,  
10:14AM 19 one of these representatives, been injured before they  
10:14AM 20 suffer a forfeiture?

10:15AM 21 MR. SCALIA: In two respects, Your  
10:15AM 22 Honor. Again, they are suing as against the plan  
10:15AM 23 terms. That is their asserted injury. That's what  
10:15AM 24 they want to join and change and I want to come back to  
10:15AM 25 that in just a moment.

10:15AM 1 But secondly, to not receive the vesting  
10:15AM 2 that ERISA entitles you to is also to be injured, to  
10:15AM 3 not get something that you are legally entitled to.  
10:15AM 4 As -- as for example, Judge Posner recognized, because  
10:15AM 5 in that case, this relates to (b)(2), we'll come to it  
10:15AM 6 later, but in that case, in a lot of the (b)(2) cases,  
10:15AM 7 in fact, I think all of the (b)(2) cases that  
10:15AM 8 Plaintiffs might be relying on, you had people with an  
10:15AM 9 active injunctive interest.

10:15AM 10 So for example in the Johnson case, and  
10:15AM 11 in some of the other cases I'm talking about, you had  
10:15AM 12 people with an active interest in what was going to  
10:15AM 13 happen in the future. Judge Posner said that these  
10:15AM 14 class members who have not yet quit or retired are  
10:15AM 15 seeking forward-looking relief as distinct from  
10:16AM 16 damages. So at least in that case they were saying  
10:16AM 17 we're not being vested properly and we want it fixed.

10:16AM 18 Plaintiffs just can't have it both ways.  
10:16AM 19 They can't say we're just suing about the plan terms  
10:16AM 20 and then turn around and say, well, we actually don't  
10:16AM 21 have injury until forfeiture and that hasn't been their  
10:16AM 22 argument. Your Honor, if I could briefly explain why  
10:16AM 23 that is.

10:16AM 24 The reason that they have made the  
10:16AM 25 litigation decision to sue over the plan terms is

1 because they want to present this as a case for  
2 injunctive relief as against the plan terms rather than  
3 a claim for benefits, which would obviously not be  
4 certifiable under any theory under (b)(2). So for  
5 strategic legal reasons, they came to you and said  
6 we're suing over the terms. And what we're saying in  
7 response is you've known those facts for time and  
8 memorial.

9 Again, they're in the plan. They're in  
10 the compensation plans. In fact, the 2005 compensation  
11 plan, which will be an exhibit in this case, I guess it  
12 is now, specifically said this is not an ERISA plan.  
13 That was the compensation plan document. And of  
14 course, the Partnership Plus Plan documents have said  
15 that as well.

16 Your Honor, Plaintiffs' Counsel cited a  
17 number of benefit claims cases from the Fifth Circuit;  
18 none of those are in their briefs. Because again,  
19 they've, as they put it, fallen back on the new theory  
20 not advanced before. But the point is, those are  
21 benefit claim cases. Those are indisputably claims  
22 seeking money; nobody is denying it.

23 They're at least pretending here that  
24 they're not seeking money, they're seeking an  
25 injunction to fix these plan terms. They have to be

10:17AM 1 held to that theory of their case, particularly because  
10:17AM 2 the forfeiture concept, which I appreciate, Your Honor,  
10:17AM 3 that you've been wrestling with, I, with all respect,  
10:17AM 4 don't think you need to wrestle with it because they  
10:17AM 5 failed to put it before you until this morning. They  
10:18AM 6 first identified it as a fallback.

10:18AM 7 Your Honor, perhaps just a -- a few more  
10:18AM 8 points. First, I also wanted to cite the Berry case,  
10:18AM 9 which is also in our briefs. I believe it's a Judge  
10:18AM 10 Schell decision from Beaumont, which also took the  
10:18AM 11 approach that we're identifying to where once you're on  
10:18AM 12 notice that the plan or plan terms don't comply with  
10:18AM 13 ERISA, then your claim accrues and needs to be brought.

10:18AM 14 And remember, Your Honor, the alternative  
10:18AM 15 is to accept two plainly incorrect propositions. One  
10:18AM 16 is that ignorance of the law is an excuse and the  
10:18AM 17 limitations period doesn't begin until you know the  
10:18AM 18 law, just wrong. And second, it's to take the position  
10:18AM 19 of the Marriott case, that a statute of limitations  
10:18AM 20 actually only begins with filing a complaint and  
10:18AM 21 therefore it's just a statute of limitless exceptions,  
10:18AM 22 which is how they would have it function.

10:18AM 23 THE COURT: Your best case that you  
10:19AM 24 would rely upon for your argument that their cause of  
10:19AM 25 action accrued when they were on notice that their --

10:19AM 1 their contribution or their account was not vesting the  
10:19AM 2 way it would under ERISA, what do you consider your  
10:19AM 3 best authority on that?

10:19AM 4 MR. SCALIA: A series of cases which  
10:19AM 5 we've cited. Union Pacific, Tenth Circuit. Hurt --

10:19AM 6 THE COURT: Anything out of the Fifth?

10:19AM 7 MR. SCALIA: Yes, I mentioned the Berry  
10:19AM 8 case from this district, B-E-R-R-Y, it's in our briefs.

10:19AM 9 THE COURT: And was that reviewed by the  
10:19AM 10 Fifth?

10:19AM 11 MR. SCALIA: Not to my knowledge.

10:19AM 12 THE COURT: Okay.

10:19AM 13 MR. SCALIA: And then Johnson -- Jenson  
10:19AM 14 V. Snelling, which we cite in our brief, which just  
10:19AM 15 stands for the elementary proposition that, among other  
10:19AM 16 things, limitations periods begin upon knowing facts.  
10:19AM 17 In fact, I think when you review the transcript, you'll  
10:19AM 18 see that Mr. Stris at one point referred to knowing the  
10:20AM 19 facts giving rise to a claim.

10:20AM 20 He spoke about the aggregation of  
10:20AM 21 circumstance. Well, what is that, Your Honor? That's  
10:20AM 22 the facts. So his own theory of when a limitations  
10:20AM 23 period begins, as it must be, is that it begins, rather  
10:20AM 24 in his fallback, is that it begins when you know facts.  
10:20AM 25 That's the right answer, but it's not the understanding

10:20AM 1 of the law that they've put before the Court in this  
10:20AM 2 case.

10:20AM 3 Your Honor, just a -- a few last points  
10:20AM 4 with regard to the limitations period. There was a  
10:20AM 5 reference to the Hilton case. Again, I haven't read  
10:20AM 6 it, it wasn't cited. I assume the Court will not be  
10:20AM 7 placing reliance on cases and legal theories and even  
10:20AM 8 claims that the Plaintiffs failed to put forth before.

10:20AM 9 THE COURT: I -- I will tell you that I  
10:20AM 10 intend to look at every case that -- that I think will  
10:21AM 11 help me in deciding this, whether the parties have  
10:21AM 12 cited it or not. So I understand, I don't expect you  
10:21AM 13 to be ready to discuss something that you have not had  
10:21AM 14 called to your attention before, but I -- I think that  
10:21AM 15 I'm responsible for my best effort to apply the law,  
10:21AM 16 whether the parties have suggested it to me or not.

10:21AM 17 MR. SCALIA: Fair enough, Your Honor.  
10:21AM 18 Although, I guess what I would urge is that to the  
10:21AM 19 extent the Plaintiffs are advancing new legal theories  
10:21AM 20 that were not advanced before, that those properly be  
10:21AM 21 regarded as waiver. Your Honor, if I could -- well,  
10:21AM 22 first of all, if you have any more questions on this  
10:21AM 23 issue, I certainly want to address them.

10:21AM 24 THE COURT: No, I think you've addressed  
10:21AM 25 them.

10:21AM 1 MR. SCALIA: So just a few last points  
10:21AM 2 that I wanted to address that Mr. Anderson and Mr.  
10:21AM 3 Stris raised. First, with regard to limitations  
10:21AM 4 period. Your Honor, I have always found it significant  
10:22AM 5 as a lawyer that when a participant in the case,  
10:22AM 6 litigant, repeatedly changes its position, that it's an  
10:22AM 7 indication that they're wrong at least once and quite  
10:22AM 8 often twice.

10:22AM 9 You're going to see that a lot from  
10:22AM 10 Plaintiffs today and I just wanted to call out one  
10:22AM 11 other example. Not that it's particularly important on  
10:22AM 12 the statute of limitations issue, it's important on  
10:22AM 13 23(b), I think, and -- and maybe also on adequacy in  
10:22AM 14 other ways. Something else that we heard for the first  
10:22AM 15 time today was that the limitations period depends  
10:22AM 16 actually not on the forum state but on where the  
10:22AM 17 different Plaintiffs happen to live. That's not what  
10:22AM 18 Plaintiffs said in their briefs. It's also not  
10:22AM 19 correct.

10:22AM 20 We've both cited cases saying it's forum  
10:22AM 21 state law. I just wanted to call it out as another  
10:23AM 22 example of an unexpected shift. So finally, just to  
10:23AM 23 address some remaining issues that were left --

10:23AM 24 THE COURT: I'm not sure that I,  
10:23AM 25 frankly, had focused on that. So it is your position

10:23AM 1 and your understanding of their position that the Texas  
10:23AM 2 statute governs all of the class members because this  
10:23AM 3 is the forum; is that what you're saying?

10:23AM 4 MR. SCALIA: That's correct, Your Honor.  
10:23AM 5 The forum states law, we've briefed that.

10:23AM 6 THE COURT: So there wouldn't be a  
10:23AM 7 problem of the class being subjected to different  
10:23AM 8 statutes of limitation?

10:23AM 9 MR. SCALIA: Under what we believe is  
10:23AM 10 the correct view of the law, again that is the view of  
10:23AM 11 the law that the Plaintiffs put forward. Now, they  
10:23AM 12 shouldn't be permitted to shift position and get this  
10:23AM 13 other respected advanced new theory, but to the extent  
10:23AM 14 that they were to do that, then that is going to create  
10:23AM 15 problems as to typicality, adequacy, and -- and simply  
10:24AM 16 manageability ultimately under Rule 23.

10:24AM 17 The -- Your Honor, just one last  
10:24AM 18 observation that I wanted to make and it has to do with  
10:24AM 19 the PowerPoints, which I know weren't even offered as  
10:24AM 20 evidence and my understanding is that they won't be  
10:24AM 21 considered as such by the Court, but particularly in  
10:24AM 22 instances where they weren't even referred to by  
10:24AM 23 Counsel during argument. But just as an example, at  
10:24AM 24 one point on the third page, the first bullet point  
10:24AM 25 purports to represent what the UBS representative, Mr.



10:24AM 1 Levitan, testified to in his deposition about how the  
10:24AM 2 plan was initially structured to be an ERISA plan and  
10:25AM 3 then not, or at least it was.

10:25AM 4 What's omitted here is that he identified  
10:25AM 5 a number of very significant changes that were  
10:25AM 6 associated with it becoming ERISA plan 2011. It's not  
10:25AM 7 material to what's been heard so far and probably  
10:25AM 8 nothing later. And again, it's just in their  
10:25AM 9 PowerPoint, but it's an omission of very important  
10:25AM 10 facts, which we've separately put into the record, that  
10:25AM 11 I thought I should -- I should mention as an example of  
10:25AM 12 why we believe that these materials shouldn't properly  
10:25AM 13 be considered as the Court makes its decision.

10:25AM 14 THE COURT: I can tell you that I'm not  
10:25AM 15 going to consider any parts of the demonstratives that  
10:25AM 16 aren't discussed during the hearing. So if that's your  
10:25AM 17 concern, you don't have to be worried about that.

10:25AM 18 MR. STRIS: Could I respond to some of  
10:25AM 19 the statute? I know there's a lot of issues in the  
10:25AM 20 case. Could I -- could I respond to some of the  
10:25AM 21 statute of limitations issues briefly?

10:25AM 22 THE COURT: Yes, that's fine. They're  
10:25AM 23 important.

10:25AM 24 MR. STRIS: So I'll try and be brief,  
10:25AM 25 Your Honor, but I actually think some context is very

10:26AM 1 important here because I was actually very surprised in  
10:26AM 2 the things my friends are giving here and all of his  
10:26AM 3 focus on waiver and changing positions and I certainly  
10:26AM 4 don't want to get into some sort of ad hominem, you  
10:26AM 5 know, like attacks back and forth. What I would like  
10:26AM 6 to do is just put some context there.

10:26AM 7 The reason I was surprised is we're at  
10:26AM 8 the class certification stage and this is very  
10:26AM 9 important. We're not -- there's not a pending motion  
10:26AM 10 to dismiss on statute of limitations grounds. There's  
10:26AM 11 not a motion for summary judgment. We're at the class  
10:26AM 12 certification stage.

10:26AM 13 And so the first time these statute of  
10:26AM 14 limitations arguments come up are in UBS' opposition to  
10:26AM 15 our motion to certify. And we've heard a lot of  
10:26AM 16 argument today about the merits of statute of  
10:26AM 17 limitations questions, but what's interesting is very  
10:26AM 18 few, if any of those arguments, go to the nature of --  
10:26AM 19 go to the question of whether those statute questions  
10:26AM 20 could be resolved on a class basis.

10:26AM 21 I'm happy to sit here and make these  
10:26AM 22 legal arguments and I have a few things that I think  
10:27AM 23 are important that I'd like to say, but if you listen,  
10:27AM 24 every single argument that we've been having back and  
10:27AM 25 forth, they're -- they're legal questions that will be

10:27AM 1 decided one way or the other and will affect the entire  
10:27AM 2 class. And so you know, in -- in briefing this case,  
10:27AM 3 we had no obligation in our class certification motion  
10:27AM 4 to anticipate a statute -- a statute of limitations  
10:27AM 5 defense.

10:27AM 6 And in writing ourself a mental brief, we  
10:27AM 7 had a limited number of pages. And in fact, UBS was  
10:27AM 8 not willing to give us additional pages and so we  
10:27AM 9 addressed the statute of limitations question very  
10:27AM 10 briefly. The notion that somehow we've waived  
10:27AM 11 arguments or we have that sort of burden here, it's  
10:27AM 12 frankly very surprising.

10:27AM 13 Now, with that said, I'd just like to  
10:27AM 14 make a few brief legal points. On what I call our  
10:27AM 15 Marriott theory, you know, the notion that the -- the  
10:27AM 16 claim accrues when the lawsuit is filed, my friend  
10:27AM 17 says, well, it's very surprising that you could have  
10:27AM 18 such a -- such a broad statute of limitations. A  
10:28AM 19 statute of limitations would mean nothing.

10:28AM 20 Let's not forget, Your Honor, that there  
10:28AM 21 is no statute of limitations in ERISA for nonfiduciary  
10:28AM 22 breached claims. You only get a limitations period  
10:28AM 23 under federal common law because the Courts have agreed  
10:28AM 24 to borrow state law. And let me cite a case that they  
10:28AM 25 have in their brief to make this point. This is on

1 page 8 of their opposition.

2 They cite the Nordstar case. It's a  
3 Supreme Court case from 1995. What that case makes  
4 clear is although the default rule under federal law is  
5 that when a statute is silent, you borrow the most  
6 analogous state law statute of limitations, that's the  
7 default rule. If borrowing a state law statute of  
8 limitations would frustrate the purpose of the federal  
9 statute, you don't do it.

10 And so to the point of waiver, I made  
11 very clear in our -- in our supplemental brief. This  
12 is page 9, footnote 9, we reserve the right to contest  
13 the premises of UBS' argument. If this case comes down  
14 to statute of limitations, I would hope that we will  
15 get the ability to actually brief at length these  
16 complicated questions, because I actually think that  
17 there are many things that could be said. But nothing  
18 you've heard today has anything to do with whether or  
19 not they can be resolved on a class basis as opposed to  
20 somehow undermining adequacy and typicality or if we're  
21 talking about a 23(b)(3) class predominance. Now,  
22 that's on our Marriott theory.

23 On what -- what my friend is calling our  
24 fallback theory, and it's anything but, if you look at  
25 page 10, footnote 12 of our opposition, of our

1 supplemental brief, we made it clear that none of these  
2 statutory statute of limitations issues are sufficient  
3 to warrant the denial of a -- of a class certification  
4 motion. And in fact, we cite a case, and this is an  
5 uncontroversial proposition, that as long as there's a  
6 sufficient constellation of common issues, even if the  
7 statute issues were -- were individualized, it wouldn't  
8 bar class certification.

9 The -- the principle and these series of  
10 cases that I cited that say that the forfeiture is the  
11 starting point, they -- they should come as no surprise  
12 to UBS because they briefed this line of cases in their  
13 papers. And they have a footnote, this is footnote 8  
14 of their supplemental brief on page 10, and it's  
15 interesting. They cite a Fourth Circuit case.

16 I found -- and it kind of made me laugh  
17 when I read it because they cite a Fourth Circuit case,  
18 but the Fifth Circuit, which is what's obviously  
19 relevant here, has clearly contrary authority that --  
20 that -- that makes it almost impossible to argue that  
21 at a minimum the forfeiture wouldn't be the starting  
22 point. So to hear my friend get up and say with some  
23 sort of consternation that I've mentioned a series of  
24 Fifth Circuit cases that he hasn't had a chance to  
25 respond to, when he's put this argument sort of into

1 the issue in his supplemental brief and cited authority  
2 from the wrong circuit, it's a little bit  
3 disconcerting.

4 So I don't want to belabor the point  
5 because I know there's many issues we need to cover  
6 today, but at the end of the day, I guess I -- I would  
7 rest on the notion that unless there is some reason for  
8 the Court to believe that these legal questions about  
9 statute of limitations are actually going to present an  
10 adequacy or typicality problem, which I have not yet  
11 heard, I don't think they require any further  
12 attention.

13 And if there is an adequacy or typicality  
14 problem, then I would hope that the argument would be  
15 directed at that so that we have an opportunity to  
16 clarify our position on why this isn't a bar to  
17 certification. Because I really -- the case is  
18 sufficiently complicated procedurally, but I'd hate for  
19 us to sort of get lost or mired in legal arguments  
20 about whether the statute of limitations applies here  
21 when it's not really relevant to the task at hand.

22 THE COURT: And frankly, my concern  
23 about the statute of limitations has been more along  
24 the lines of whether or not it would make the -- the  
25 class difficult to administer if you had multiple

10:32AM 1 different statutes that would apply. I'm understanding  
10:32AM 2 now that I simply missed that issue, that -- that in  
10:32AM 3 fact, the parties agree that the entire class would be  
10:32AM 4 bound by the -- the single statute from the forum.

10:32AM 5 MR. STRIS: Although with respect, Your  
10:32AM 6 Honor, I -- I -- I don't think the parties agree on  
10:32AM 7 that issue. I don't think the -- our position has  
10:32AM 8 always been the Court need not reach the statute of  
10:32AM 9 limitations questions now. If you're forcing me to  
10:32AM 10 take a position on sort of the merits of the statute of  
10:32AM 11 limitations issue, I believe that neither side has  
10:32AM 12 taken a position on what the borrowing would be.

10:32AM 13 THE COURT: Well, it's -- it's a very  
10:32AM 14 commonplace thing that in nationwide class actions  
10:33AM 15 there is an issue about manageability and predominance  
10:33AM 16 and other factors dealing with the question whether  
10:33AM 17 different class members are going to be subjected to --

10:33AM 18 MR. STRIS: That's correct.

10:33AM 19 THE COURT: -- different statute of  
10:33AM 20 limitations, so --

10:33AM 21 MR. STRIS: Well, can I speak --

10:33AM 22 THE COURT: -- that's the extent to which  
10:33AM 23 I'm forcing you to deal with it now.

10:33AM 24 MR. STRIS: But I'd like to speak to that  
10:33AM 25 directly. Let's -- instead of saying what the parties

10:33AM 1 are going to argue, let me put it this way. Let's take  
10:33AM 2 what I would describe as the worst case scenario for us  
10:33AM 3 and I'll explain why it doesn't matter. The worst case  
10:33AM 4 scenario is that the correct view of the law is that  
10:33AM 5 you borrow the state law statutes and then -- and the  
10:33AM 6 relevant statutory period comes from the -- the  
10:33AM 7 residency state of every class member.

10:33AM 8 Let's assume that's the case for a  
10:33AM 9 minute, because that very well may be the law. Well,  
10:33AM 10 that -- that is -- that does not present any reason to  
10:33AM 11 deny class certification in a case like this. We're  
10:34AM 12 talking about a class of thousands. This isn't  
10:34AM 13 Wal-Mart versus Dukes where we're talking about one and  
10:34AM 14 a half million people.

10:34AM 15 UBS undoubtedly has clear records and  
10:34AM 16 I -- and I challenge them to stand up and challenge  
10:34AM 17 this, as to what state every Plaintiff is in and it's  
10:34AM 18 clear --

10:34AM 19 THE COURT: And what if the Plaintiffs  
10:34AM 20 have moved around during the applicable period?

10:34AM 21 MR. STRIS: Well, I -- I -- again, I --  
10:34AM 22 I did not come prepared to discuss, like, all -- all of  
10:34AM 23 the nuances of statute of limitations that I didn't  
10:34AM 24 think were relevant, but I -- I will say, I will make  
10:34AM 25 the representation that I believe the law -- the



10:34AM 1 relevant law here is that the -- the -- the residency  
10:34AM 2 of the individual at the point in time in question, I  
10:34AM 3 don't know if it's the filing of the -- of the  
10:34AM 4 complaint, I doubt -- I doubt it. I believe it's the  
10:34AM 5 residency when they participated in the plan is --  
10:34AM 6 is -- is the relevant state that you would use.

10:34AM 7 But there's -- there's an answer to that  
10:34AM 8 and it's going to be an answer that's reflected in UBS'  
10:34AM 9 records. So all that's required, Your Honor, I don't  
10:34AM 10 mean to be flip, all that's required under the worst  
10:35AM 11 case scenario for us, Your Honor, is that we look to  
10:35AM 12 UBS' records, figure out the relevant state. Then you  
10:35AM 13 look at a chart and I -- we cite this chart in our  
10:35AM 14 papers of what the -- the -- the contract state law  
10:35AM 15 statutory period is in that state, and it's -- it's a  
10:35AM 16 simple administrative calculation.

10:35AM 17 This is not like the cases that UBS sites  
10:35AM 18 where the -- the reason why the statute of limitations  
10:35AM 19 question destroyed the ability to proceed as a class is  
10:35AM 20 because there were very complicated individualized  
10:35AM 21 factors such as the constructive knowledge or the  
10:35AM 22 active knowledge --

10:35AM 23 THE COURT: Well, if the only thing  
10:35AM 24 borrowed is the time period, then perhaps what you're  
10:35AM 25 describing could work. But if the accrual and

10:35AM 1 interruption and other state law doctrines regarding  
10:35AM 2 statute of limitations are also borrowed, then --

10:36AM 3 MR. STRIS: Oh, but they're not.

10:36AM 4 THE COURT: -- it becomes a problem --

10:36AM 5 MR. STRIS: Sure.

10:36AM 6 THE COURT: -- that can affect  
10:36AM 7 certification.

10:36AM 8 MR. STRIS: But -- but the law is clear  
10:36AM 9 and UBS concedes this point, it's just black letter  
10:36AM 10 law. The accrual period for the question of a federal  
10:36AM 11 cause of action, the -- the accrual of the statute of  
10:36AM 12 limitations is a question of federal law. And I'm  
10:36AM 13 going to be honest, there are some cases where that  
10:36AM 14 presents an insuperable bar to class certification.  
10:36AM 15 Those are cases where the constructive knowledge or the  
10:36AM 16 actual knowledge of specific facts on the part of  
10:36AM 17 individual Plaintiffs is going to -- is going to  
10:36AM 18 dictate the answer to the question. That's not this  
10:36AM 19 case.

10:36AM 20 In this case accrual is either going to  
10:36AM 21 be pegged to forfeiture, which is just a clear  
10:36AM 22 administrative matter looking to UBS' records or the  
10:36AM 23 Court will accept our Marriott argument and accrual  
10:36AM 24 will be pegged essentially to the filing of the  
10:36AM 25 complaint. There -- there's no scenario under which

10:36AM 1 UBS' statute of limitations argument presents any  
10:36AM 2 individualized inquiries -- requires any sort of  
10:37AM 3 individualized inquiries that would warrant the denial  
10:37AM 4 of -- of -- of class certification.

10:37AM 5 THE COURT: All right. I think that,  
10:37AM 6 Mr. Scalia, maybe the best way to approach this, and  
10:37AM 7 I'll give you an opportunity for a brief rejoinder, but  
10:37AM 8 would be for you to address what you feel are the  
10:37AM 9 issues that you have on the Rule 23(a) requirements.  
10:37AM 10 And once you've identified those, we -- I can ask the  
10:37AM 11 Plaintiffs to respond, because I think some of them are  
10:37AM 12 probably not at issue.

10:37AM 13 MR. SCALIA: We don't challenge  
10:37AM 14 numerosity and for present purposes aren't challenging  
10:37AM 15 commonality, Your Honor. So it's typicality and  
10:37AM 16 adequacy. We've already, obviously, talked about one  
10:37AM 17 issue bearing on that. The releases bear on that, so  
10:38AM 18 do receipt of in-service situations.

10:38AM 19 THE COURT: All right.

10:38AM 20 MR. SCALIA: And of course we have the  
10:38AM 21 waiver, which we regard as really the threshold issue.

10:38AM 22 THE COURT: Well, we'll -- we can take  
10:38AM 23 those up in any order you prefer.

10:38AM 24 MR. SCALIA: Would you like me to begin  
10:38AM 25 by addressing them, Your Honor?

10:38AM 1 THE COURT: Yes.

10:38AM 2 MR. SCALIA: Your Honor, if I could then  
10:38AM 3 begin simply by responding briefly just a few points in  
10:38AM 4 the discussion you just had with Mr. Stris.

10:38AM 5 First, Plaintiffs' Counsel is suggesting  
10:38AM 6 that this question of accrual limitations period  
10:38AM 7 doesn't go to Rule 23(a) issues, but of course it does.  
10:38AM 8 Our -- our view is that under very clear legal  
10:38AM 9 principles, all of these Plaintiffs' claims are  
10:38AM 10 time-barred, at least from inadequate representatives.  
10:38AM 11 Mr. Stris explained that Plaintiffs had not addressed  
10:38AM 12 certain legal issues including the limitations period  
10:38AM 13 because Defendants had refused to give an extension of  
10:38AM 14 the page limit. I think when he reflects on that,  
10:39AM 15 he'll realize that actually we did --

10:39AM 16 THE COURT: That's not an issue you need  
10:39AM 17 to worry about.

10:39AM 18 MR. SCALIA: I just want you to know  
10:39AM 19 that we actually did, from five pages to 15 pages. I  
10:39AM 20 think he'll confirm that when he thinks about it, but I  
10:39AM 21 think it was important to mention.

10:39AM 22 There was a moment where Mr. Stris  
10:39AM 23 offered an alternative, even third theory for the  
10:39AM 24 limitations period in which he cited a Supreme Court  
10:39AM 25 case that really is not opposite, but suggested that

10:39AM 1 maybe there's no limitations period whatsoever. That,  
10:39AM 2 I would suggest, is emblematic of this sort of  
10:39AM 3 floundering and flailing about for different legal  
10:39AM 4 theories when dissatisfied that the one initially put  
10:39AM 5 forward was not satisfactory.

10:39AM 6 Your Honor, you asked a couple questions  
10:39AM 7 about applying different states' limitations periods  
10:39AM 8 and they do matter. But again, they go to adequacy and  
10:39AM 9 typicality and potential conflicts within the class.

10:39AM 10 THE COURT: Why would that matter if  
10:39AM 11 your position is correct that -- that the forum states  
10:40AM 12 statute applies to the whole class?

10:40AM 13 MR. SCALIA: Well, that would mean that  
10:40AM 14 they're not adequate because they're all time barred,  
10:40AM 15 but I agree the manageability issues, Your Honor, are  
10:40AM 16 less. You raised, though, the question of Plaintiffs'  
10:40AM 17 moving and it's a very good question. Actually Mr.  
10:40AM 18 Stacy, who was put forward as the lead representative  
10:40AM 19 Plaintiff in the Hendricks case did move and --

10:40AM 20 THE COURT: Why would that matter if  
10:40AM 21 your position on the statute is correct?

10:40AM 22 MR. SCALIA: It wouldn't. But as to the  
10:40AM 23 approach that's now being suggested by the Plaintiffs  
10:40AM 24 which concerned you from a manageability perspective,  
10:40AM 25 it would matter, Your Honor. It would matter also

10:40AM 1 because where the statute of limitations period is  
10:40AM 2 longer or shorter, these Plaintiffs may have an  
10:40AM 3 interest in stating what the legal rule is that's  
10:40AM 4 different from, for example, where the limitations  
10:40AM 5 period may be shorter.

10:40AM 6 And -- and -- and finally, Your Honor,  
10:40AM 7 with regard to the theory that Plaintiffs have given as  
10:41AM 8 to when accrual does -- does occur, you asked whether  
10:41AM 9 state law accrual rules were used or whether Federal  
10:41AM 10 Rules are -- are used and I agree with Plaintiffs'  
10:41AM 11 Counsel that there's a federal accrual rule. It's --  
10:41AM 12 it's the discovery principle which we would say, you  
10:41AM 13 know, is reflected by this chart.

10:41AM 14 However, this is another respect in which  
10:41AM 15 Plaintiffs' theory of discovery would make this case  
10:41AM 16 absolutely unmanageable as a class action, because  
10:41AM 17 imagine a discussion where a class member comes to  
10:41AM 18 somebody in a senior position at UBS and says, how come  
10:41AM 19 I'm not getting vested? I would -- expected to be  
10:41AM 20 vested by now and that person at UBS says, well, this  
10:41AM 21 is a deferred compensation plan. It's -- it's not an  
10:41AM 22 ERISA plan. Here, look at our 2005 compensation plan  
10:41AM 23 document which says it's not an ERISA plan.

10:41AM 24 Under Plaintiffs' own theory, even under  
10:42AM 25 their theory, surely that person who's then told that

10:42AM 1 this isn't an ERISA plan in response to an exact  
10:42AM 2 question of whether it's an ERISA plan, certainly that  
10:42AM 3 person has now received sufficient notice under their  
10:42AM 4 mistaken theory to come forward, but that's a very  
10:42AM 5 imaginable theory on a class basis, Your Honor.

10:42AM 6 THE COURT: What's the -- the question  
10:42AM 7 would be whether they'd been injured at that point.  
10:42AM 8 And frankly, I do think that injury is the touchstone  
10:42AM 9 for the running of that limitation period. But in any  
10:42AM 10 event, I do understand your position.

10:42AM 11 MR. SCALIA: Right. And -- and our  
10:42AM 12 belief is that the injury occurs once you're on -- once  
10:42AM 13 you're aware that you are not vesting in accordance  
10:42AM 14 with ERISA.

10:42AM 15 Your Honor, if I could just take a moment  
10:42AM 16 to grab my notes --

10:42AM 17 THE COURT: Okay.

10:42AM 18 MR. SCALIA: -- for these -- these other  
10:42AM 19 issues that you'd like me to address.

10:43AM 20 THE COURT: Mr. Scalia, I tell you what,  
10:43AM 21 we're going to take about a 10 minute recess now and  
10:43AM 22 that will give you a chance to gather your notes and  
10:43AM 23 then we'll come back and we'll start with these issues  
10:43AM 24 that you've identified.

10:43AM 25 MR. SCALIA: Yes, Your Honor.

10:43AM 1 THE COURT: Thank you.

10:43AM 2 LAW CLERK: All right.

10:43AM 3 (Recess.)

10:43AM 4 LAW CLERK: All rise.

10:43AM 5 THE COURT: Thank you. Please be seated.

10:55AM 6 Mr. Scalia, you had the floor. Do you  
10:55AM 7 want to address the class action waiver issue?

10:55AM 8 MR. SCALIA: Yes, Your Honor. What I  
10:55AM 9 would propose to do is begin with waiver and then  
10:55AM 10 brief -- briefly address the release issue and  
10:56AM 11 in-service distributions.

10:56AM 12 Your Honor, with regard to the waiver,  
10:56AM 13 these are highly intelligent, sophisticated individuals  
10:56AM 14 whose very purpose is to advise others regarding their  
10:56AM 15 financial resources and who also have far more than the  
10:56AM 16 usual amount of ability to look out for their own  
10:56AM 17 financial well-being.

10:56AM 18 THE COURT: I understand, but some  
10:56AM 19 people might say they're more in sales than -- but in  
10:56AM 20 any event, I consider that argument to be similar to  
10:56AM 21 their argument that UBS is an evil entity. I  
10:56AM 22 understand you're saying they're sophisticated and that  
10:56AM 23 should be held against them, but in any event, let's  
10:56AM 24 talk about the waiver itself.

10:56AM 25 MR. SCALIA: Yes. And what I'd like to



10:56AM 1 do is put it up on the slide. And the reason, Your  
10:56AM 2 Honor, that I mentioned their sophistication is simply  
10:56AM 3 to their credit, they have not come before the Court,  
10:56AM 4 as you sometimes have in waiver cases, and claim that  
10:57AM 5 it was unconscionable, that they entered it under  
10:57AM 6 duress. It is an undisputed fact that the Plaintiffs  
10:57AM 7 in this case signed a waiver that said in no uncertain  
10:57AM 8 terms that they would not participate in a class action  
10:57AM 9 relating to their employment or the separation of their  
10:57AM 10 employment from UBS. And so if we could -- I guess  
10:57AM 11 again we're attempting to display this slide.

12 COURT CLERK: Number three.

13 MR. SCALIA: Three? What's the sequence,  
14 power and then three?

15 COURT CLERK: It's just the left table  
16 and number three.

10:58AM 17 MR. SCALIA: Okay. Why don't we hand a  
10:58AM 18 copy up to the Judge and a copy to Plaintiffs' table as  
10:58AM 19 well.

10:58AM 20 Your Honor, this waiver is one that all  
10:58AM 21 the Claimants signed, either in 2007 or 2008 and  
10:58AM 22 included with our opening brief the waiver document  
10:58AM 23 itself. It is a page, page 26 from Docket No. 77,  
10:58AM 24 entry 21 and the 2008 waiver, is Docket 77, entry 7.  
10:58AM 25 And Your Honor, what this page illustrates is simply

10:58AM 1 the entire coincidence in overlap between the claim  
10:58AM 2 being brought now and the waiver they signed. They  
10:59AM 3 agreed, as this language shows, to waive any right to  
10:59AM 4 commence or be a party to or an actual putative class  
10:59AM 5 member of any class or collective action arising out of  
10:59AM 6 or relating to your employment with UBS or the  
10:59AM 7 termination of employment with UBS.

10:59AM 8 That's what this case concerns, Your  
10:59AM 9 Honor. Mr. Eddingston admitted that in deposition.  
10:59AM 10 Mr. Eddingston is the lead Plaintiff in the Eddingston  
10:59AM 11 case. His testimony was accepted as satisfactory for  
10:59AM 12 all and when he was asked whether his claims arise out  
10:59AM 13 of his employment or the termination of employment, he  
10:59AM 14 said yes, they do.

10:59AM 15 And finally, Your Honor, we quote from  
10:59AM 16 the complaint itself where in stating those on behalf  
10:59AM 17 they sue -- they sue, they said those employed by  
10:59AM 18 Defendant or those who left the employment of  
10:59AM 19 Defendant, Your Honor.

10:59AM 20 Your Honor, with all respect, I think  
10:59AM 21 it's that simple. There's an entire overlap between --

10:59AM 22 THE COURT: Where is this waiver  
10:59AM 23 contained? What -- what document is this --

11:00AM 24 MR. SCALIA: This waiver is in what's  
11:00AM 25 called a compensation plan document. Your Honor, I can

11:00AM 1 have handed up to you a copy of the 2007 compensation  
11:00AM 2 plan.

11:00AM 3 THE COURT: All right.

11:00AM 4 MR. SCALIA: And this document is one  
11:00AM 5 that you were shown at the prior hearing, Your Honor.  
11:00AM 6 And what Plaintiffs urged upon you in the prior hearing  
11:00AM 7 was that this was what they called then and call now  
11:00AM 8 simply a summary brochure, not an important document,  
11:00AM 9 didn't mean much. Your Honor, it's -- it's page 26  
11:00AM 10 that the provision appears.

11:00AM 11 THE COURT: They contend in their briefs  
11:00AM 12 that there is a provision in this document that refers  
11:00AM 13 to the document itself as a mere summary of the -- at  
11:00AM 14 some larger plan, which they've contended in their  
11:00AM 15 briefs is said to control in the event of any  
11:00AM 16 difference.

11:00AM 17 MR. SCALIA: Your Honor, if you could  
11:01AM 18 turn to page 19 of that document and allow me to  
11:01AM 19 respond to that. You can see the sort of footnote down  
11:01AM 20 there and then respond to the broad point.

11:01AM 21 In the prior hearing on arbitration when  
11:01AM 22 the Plaintiffs contended that this was just a  
11:01AM 23 relatively meaningless mere summary document, you asked  
11:01AM 24 to see a copy. And when you saw a copy, recognized its  
11:01AM 25 length and the number of issues that it addressed, you

11:01AM 1 were no longer receptive to that argument. At that  
11:01AM 2 point, the Plaintiffs changed course to try a different  
11:01AM 3 argument on you.

11:01AM 4 If I could just point out a couple of  
11:01AM 5 things on this page 19. First, the footnote says: In  
11:01AM 6 the event of a conflict between the summary of the  
11:01AM 7 plans set forth in this brochure and the plan  
11:01AM 8 documents, the plan documents will control. This  
11:01AM 9 document on this particular page, page 19, is  
11:01AM 10 summarizing the PartnerPlus Plan. It's talking about  
11:01AM 11 PartnerPlus functions. And at the very end on page 22,  
11:02AM 12 Your Honor, it -- it again says: Any difference  
11:02AM 13 between this summary and the plan document, the plan  
11:02AM 14 document will govern.

11:02AM 15 As the transcript from the prior hearing  
11:02AM 16 will show, you recognized then, Your Honor, as I think  
11:02AM 17 is, you know, plainly correct, this is a reference to  
11:02AM 18 the summary of the Partnership Plan operation itself.  
11:02AM 19 It's short, but it does not mean that this document as  
11:02AM 20 a whole is not an effective, controlling, legally  
11:02AM 21 binding document. And in fact, every one of the  
11:02AM 22 Plaintiffs, if you go to the very end of this document,  
11:02AM 23 it has a signature page. This is page 29, a  
11:02AM 24 compensation plan acknowledgement, they all signed it.  
11:02AM 25 We've got these among our exhibits with our opening

11:02AM 1 opposition brief.

11:02AM 2 This is a powerful, controlling document  
11:02AM 3 governing their relationship. And just while you're on  
11:02AM 4 page 19, Your Honor, you'll see that in the second  
11:03AM 5 bullet point it refers to the recognition Council --  
11:03AM 6 I'm sorry, in the first bullet point, members and then  
11:03AM 7 the next bullet point below there it talks about  
11:03AM 8 deferred productivity and UBS length of service awards,  
11:03AM 9 and then the asset and credit line growth award. Your  
11:03AM 10 Honor --

11:03AM 11 THE COURT: Which page are you --

11:03AM 12 MR. SCALIA: This is page 19.

11:03AM 13 THE COURT: My page 19 summarizes the  
11:03AM 14 UBS PartnerPlus Plan?

11:03AM 15 MR. SCALIA: That's right. And the  
11:03AM 16 first bullet refers to recognition Council members.

11:03AM 17 THE COURT: All right. I see that.

11:03AM 18 MR. SCALIA: And the next bullet talks  
11:03AM 19 about deferred productivity and UBS length of service  
11:03AM 20 awards. What this is doing, Your Honor, is explaining  
11:03AM 21 that those different bonuses get poured into  
11:03AM 22 PartnerPlus. So again, this document, if you go to  
11:03AM 23 page 18, you'll see that it talks about a couple of  
11:04AM 24 those awards, a couple of those bonuses. Page 18 talks  
11:04AM 25 about the productivity and UBS length of service award.

11:04AM 1 Page 18 was the document for these  
11:04AM 2 Plaintiffs which told them how these awards would be  
11:04AM 3 calculated. And then page 19 explains how those awards  
11:04AM 4 get put into PartnerPlus. So although pages 19 through  
11:04AM 5 22 summarize PartnerPlus, as you see from page 18 or if  
11:04AM 6 you go back to page 16, which talks about some other --  
11:04AM 7 the recognition Councils, this document is governing  
11:04AM 8 their compensation, setting the terms, and then also  
11:04AM 9 summarizing related plans that essentially are  
11:04AM 10 recipients of the awards earned as a consequence of  
11:04AM 11 this compensation plan document.

11:04AM 12 Ironically, there is a separate summary  
11:04AM 13 that sometimes has been given out by UBS that  
11:04AM 14 summarizes this in PartnerPlus, but this is no summary  
11:04AM 15 brochure. This is a document that is critical in  
11:05AM 16 determining their compensation.

11:05AM 17 And again, to get to the punch line, Your  
11:05AM 18 Honor, it's a very clear waiver. It's a broad waiver.  
11:05AM 19 It covers exactly what the complaint says their case  
11:05AM 20 concerns and it covers what Mr. Eddingston, the  
11:05AM 21 representative Plaintiff, admitted what he was suing  
11:05AM 22 over.

11:05AM 23 I will have just a couple last points to  
11:05AM 24 add. I think that anything further I have to say to  
11:05AM 25 this is best in replying to Plaintiffs' Counsel,

11:05AM 1 because quite candidly, something this clear that they  
11:05AM 2 all signed, that they don't claim to be unconscionable  
11:05AM 3 in any way, disposes of this case in an instant.

11:05AM 4 I'll just make two brief points finally.  
11:05AM 5 They said that this is different than the PartnerPlus  
11:05AM 6 Plan and that's immaterial. What that means is there's  
11:05AM 7 no conflict because they're different. They've said  
11:05AM 8 the PartnerPlus Plan arbitration language is narrow;  
11:05AM 9 that doesn't matter, this is plainly broad and it  
11:05AM 10 plainly covers their points.

11:06AM 11 Your Honor, just to turn finally to the  
11:06AM 12 releases, Mr. Stacy signed a release of his claims --

11:06AM 13 MR. STRIS: Sorry, excuse me, I -- I  
11:06AM 14 don't want to interrupt, but it might be more efficient  
11:06AM 15 if I could respond to the waiver first, because I think  
11:06AM 16 we're talking about a lot of --

11:06AM 17 THE COURT: I -- I do agree with that.  
11:06AM 18 I'd -- I'd like to hear the argument on the waiver.  
11:06AM 19 And I'm sorry, I didn't realize that you had moved on  
11:06AM 20 to the release, Mr. Scalia.

11:06AM 21 MR. SCALIA: Thank you, Your Honor.

11:06AM 22 THE COURT: Thank you.

11:06AM 23 MR. STRIS: Your Honor, again, it's  
11:06AM 24 interesting to hear, my friend said this issue is  
11:06AM 25 simple. I'd agree with him. I just think it's simple

11:06AM 1 in the other direction. And here's what I think I'd  
11:06AM 2 like to do on that score. I'd like to point -- I'd  
11:06AM 3 like you to take out, if you don't mind, the 2007  
11:06AM 4 financial advisory compensation plan that he's put in  
11:06AM 5 front of you and I'd like to go through what I think  
11:06AM 6 are the most relevant provisions.

11:07AM 7 And I'd like to start with a page that  
11:07AM 8 he -- that my friend did not point out, which is page  
11:07AM 9 27, it's the conclusion. I -- I -- I -- I've been told  
11:07AM 10 since I was young, it's often good to start with your  
11:07AM 11 conclusion. And here UBS led with that conclusion and  
11:07AM 12 it couldn't be any clearer. It says: The 2007  
11:07AM 13 financial advisor compensation plan summarizes many,  
11:07AM 14 but not all of the elements of your compensation.

11:07AM 15 Now, my point is not that that -- that  
11:07AM 16 ends the inquiry, but it starts the inquiry. It makes  
11:07AM 17 it clear that this document summarizes a number of  
11:07AM 18 other things. So with that starting point, now let's  
11:07AM 19 look at some of the other provisions.

11:07AM 20 Now, my friend focussed a lot on the  
11:07AM 21 footnote on page 19. And he -- I believe he did that  
11:07AM 22 on purpose because that language talks about the event  
11:07AM 23 of a conflict and although that language is good, it's  
11:07AM 24 not the language that we rely on. We rely on the  
11:07AM 25 language on page 22 of this document. And let's be



11:08AM 1 very clear about what it says. It says: If there is  
11:08AM 2 any difference between this summary and the plan  
11:08AM 3 document, the plan document will govern.

11:08AM 4 Now, we read that consistent with the  
11:08AM 5 conclusion of this document itself as referring to it  
11:08AM 6 in its entirety. If there's any difference between  
11:08AM 7 this summary, meaning the entire brochure, and the plan  
11:08AM 8 document, the plan document will govern.

11:08AM 9 And I'd like to say a few things about  
11:08AM 10 why that interpretation must be adopted in this case.  
11:08AM 11 First, UBS has gone to great pains to argue that we  
11:08AM 12 have not yet proven that this is an ERISA plan. Okay.  
11:08AM 13 Well, let's -- let's look at what that would mean.  
11:08AM 14 That means that at this stage in the case, you  
11:08AM 15 interpret this document under general canons of  
11:08AM 16 contract law. And one general canon of contract law  
11:08AM 17 that we pointed out, that has never been responded to  
11:08AM 18 by UBS, is that unquestionably you interpret any  
11:08AM 19 ambiguity against the drafter.

11:09AM 20 At a minimum the interpretation that I've  
11:09AM 21 advanced here, that being if there's any difference  
11:09AM 22 between this summary, this summary can mean being the  
11:09AM 23 entire document and the plan document, the plan  
11:09AM 24 document will govern, at a minimum that is a credible  
11:09AM 25 interpretation of this provision, particularly in light

11:09AM 1 of the conclusion that it self-describes the entirety  
11:09AM 2 of the document as a summary. And as such, I -- I  
11:09AM 3 guess here's where I agree with -- with -- with my  
11:09AM 4 friend side opposite, the issue is very simple. And --  
11:09AM 5 and the reason the -- the issue is simple is because  
11:09AM 6 the -- the -- the PartnerPlus Plan provision and the  
11:09AM 7 arbitration provision here, they're not only different,  
11:09AM 8 they're staggeringly different.

11:09AM 9 And so let's talk about that for a  
11:09AM 10 minute.

11:09AM 11 THE COURT: Well, let me stick for a  
11:09AM 12 minute with your interpretation of the document.

11:09AM 13 MR. STRIS: Okay.

11:09AM 14 THE COURT: It does seem to me that page  
11:10AM 15 19 starts a discrete part of this document that  
11:10AM 16 discusses the UBS PartnerPlus/UBS Financial Advisor  
11:10AM 17 Deferred Award Plan and that it specifically recites  
11:10AM 18 that it's a summary of that plan; though, it also says  
11:10AM 19 summary of the plans, plural, set forth in this  
11:10AM 20 brochure, down in the asterisks footnote. But in any  
11:10AM 21 event, I -- I don't think it's a fair reading of this  
11:10AM 22 document to say that the reference on page 19 and again  
11:10AM 23 on page 22 to this summary refers to the entire  
11:10AM 24 document.

11:10AM 25 MR. STRIS: Could I -- may I respond to

11:10AM 1 that, Your Honor?

11:10AM 2 THE COURT: Yeah, that's why I'm saying  
11:10AM 3 it.

11:10AM 4 MR. STRIS: Yeah. So I -- I think with  
11:11AM 5 respect, it is at a minimum a fair reading, and let me  
11:11AM 6 see if I can explain why by -- by referring to  
11:11AM 7 contents. So if we look at the whole reason we're  
11:11AM 8 here, page 26 of the document, which is entitled with a  
11:11AM 9 big heading arbitration. This provision, it's a --  
11:11AM 10 it's -- it's a dispute resolution provision that has a  
11:11AM 11 number of elements to it and it's under the heading  
11:11AM 12 arbitration. No one in this case disputes that the  
11:11AM 13 formal PartnerPlus document also has a dispute  
11:11AM 14 resolution provision and that it's -- it also has the  
11:11AM 15 exact same title, arbitration.

11:11AM 16 There is literally no way to give force  
11:11AM 17 to both of those provisions and we gave a number of  
11:11AM 18 reasons why in our supplemental brief. They by their  
11:11AM 19 own terms, they apply different states' laws. One  
11:11AM 20 applies New Jersey law. One applies New York law.  
11:11AM 21 They carve out different claims. The -- the one in the  
11:11AM 22 plan doesn't mention anything about injunctive relief.  
11:11AM 23 This one here cars out -- carves out injunctive relief.  
11:12AM 24 They talk about different arbitral bodies.

11:12AM 25 They are two, not only different, but

11:12AM 1 contradictory dispute resolution provisions. So it --  
11:12AM 2 it presents, actually if you think about it, a fairly  
11:12AM 3 straight forward problem, which is what happens when  
11:12AM 4 you get a case where it's unquestionably a lawsuit over  
11:12AM 5 the PartnerPlus Plan. And I think UBS would agree that  
11:12AM 6 the PartnerPlus Plan is more narrow than the  
11:12AM 7 compensation work, what I call the summary brochure.

11:12AM 8 Do you give force to the specific  
11:12AM 9 arbitration provision in the PartnerPlus Plan that only  
11:12AM 10 applies to disputes under the PartnerPlus Plan or do  
11:12AM 11 you give force to the contradictory, or at a minimum,  
11:12AM 12 different arbitration provision in the summary  
11:12AM 13 brochure. You have to pick one. See, this -- this is  
11:12AM 14 the -- this is where UBS' argument breaks down. They  
11:12AM 15 want to suggest that somehow you can reconcile them.  
11:12AM 16 You can't.

11:12AM 17 You can't apply -- if one says apply New  
11:13AM 18 Jersey law and the other says apply New York law, if  
11:13AM 19 one carves out claims for injunctive relief, the other  
11:13AM 20 doesn't, that means you have two provisions and you  
11:13AM 21 have to pick one. So even if there had been no  
11:13AM 22 precatory language in this -- in this brochure, I think  
11:13AM 23 we would be right that as a matter of contract law, you  
11:13AM 24 apply the one that's more directly relevant.

11:13AM 25 But UBS has made it easier for us.

11:13AM 1 They've put language in here that says, hey, we're  
11:13AM 2 going to summarize a formal plan document. We're going  
11:13AM 3 to talk about a legal document that is many times the  
11:13AM 4 length of this summary. And hey, we want to be clear,  
11:13AM 5 and they say it in two places. In one place they say  
11:13AM 6 it was a conflict; in another place they say if there's  
11:13AM 7 any differences.

11:13AM 8                   Think about what that means. It means  
11:13AM 9 the spirit of this document which UBS drafted which  
11:13AM 10 must be construed against them is, hey, we want to  
11:13AM 11 enforce our plan and so we're trying to summarize  
11:13AM 12 things here, but if there's any confusion and -- and my  
11:13AM 13 friend keeps talking about how our clients are all  
11:14AM 14 sophisticated, well, if a sophisticated person looks at  
11:14AM 15 this and they're told again and again and again, hey,  
11:14AM 16 if there's any difference, if there's any conflict, go  
11:14AM 17 look at the formal plan document, then at -- at a  
11:14AM 18 minimum I think that should establish that -- that it's  
11:14AM 19 a sensible and reasonable reading of this provision to  
11:14AM 20 say you don't apply the -- the -- anything in the  
11:14AM 21 provision entitled arbitration in the summary when you  
11:14AM 22 could apply the provision that's entitled arbitration  
11:14AM 23 in the plan document.

11:14AM 24                   And I think that's true irrespective, I  
11:14AM 25 know that's true irrespective of whether PartnerPlus is

11:14AM 1 an ERISA plan. And that's why we have been, you know  
11:14AM 2 content -- we've been claiming again and again and  
11:14AM 3 again that there's no reason today for this Court to  
11:14AM 4 wade into the merits issues about the ERISA status of  
11:14AM 5 the PartnerPlus Plan. Not because, as my friend  
11:14AM 6 suggests, we take the position that it's never  
11:14AM 7 appropriate to wade into the merits of a case of --  
11:15AM 8 a -- a -- of a class action case, of course it is, but  
11:15AM 9 the only reason UBS is trying to litigate at this stage  
11:15AM 10 the merits of whether the PartnerPlus Plan is an ERISA  
11:15AM 11 plan is because they seem to believe that this contract  
11:15AM 12 argument that we're making is wrong and thus we have to  
11:15AM 13 go to our secondary argument and I would concede.

11:15AM 14 But if we get to our secondary argument,  
11:15AM 15 if you reject our interpretation as a matter of  
11:15AM 16 contract, then in order to avoid the effect of this  
11:15AM 17 provision, we would have to make a different argument,  
11:15AM 18 one of which would be that this is an ERISA case.  
11:15AM 19 PartnerPlus is an ERISA plan. And this can't modify  
11:15AM 20 the -- the ERISA plan. But you don't need to get  
11:15AM 21 there, if you accept what I think you must, which is a  
11:15AM 22 contract-based argument, which is a reasonable  
11:15AM 23 interpretation of a document that was intended as a  
11:15AM 24 summary and that has to be construed against UBS, the  
11:16AM 25 drafter.

11:16AM 1 THE COURT: If your argument is that  
11:16AM 2 this arbitration clause should not apply to your claims  
11:16AM 3 because there is a separate arbitration clause in the  
11:16AM 4 PartnerPlus Plan document?

11:16AM 5 MR. STRIS: That's exactly right. This  
11:16AM 6 case -- we would be in a very different situation, Your  
11:16AM 7 Honor, if UBS, as they could have, they're  
11:16AM 8 sophisticated, you know, talk about sophisticated, they  
11:16AM 9 were well advised here. They could have written a  
11:16AM 10 PartnerPlus Plan that did not have a dispute resolution  
11:16AM 11 provision in it, that did not have an arbitration  
11:16AM 12 provision and -- and the irony of this is that every  
11:16AM 13 version of the PartnerPlus Plan beginning in 1995, and  
11:16AM 14 I think this is important, Your Honor, every version of  
11:16AM 15 the PartnerPlus Plan has had an arbitration and dispute  
11:16AM 16 resolution provision.

11:16AM 17 This summary brochure, which they  
11:16AM 18 circulated every year, and we have in the record all of  
11:16AM 19 them from, I think, 2000 to 2010, they only began to  
11:16AM 20 put this provision in starting in 2007.

11:17AM 21 THE COURT: Is there a separate  
11:17AM 22 financial advisor compensation plan document other than  
11:17AM 23 this that -- that exists?

11:17AM 24 MR. STRIS: No, and -- but --

11:17AM 25 THE COURT: So this is not just a

11:17AM 1 summary of the financial advisor compensation plan, it  
11:17AM 2 is the plan document?

11:17AM 3 MR. STRIS: This -- well, it depends on  
11:17AM 4 what you mean by plan document. I -- I cannot dispute  
11:17AM 5 that this is a plan. It's called the 2007 Financial  
11:17AM 6 Advisor Compensation Plan, but we have to pause for a  
11:17AM 7 minute to reflect on what that means. The reason why  
11:17AM 8 they call it a plan, and I'm not trying to be -- to be  
11:17AM 9 glib here, it's because some parts of this document  
11:17AM 10 describe types of compensation that are not governed by  
11:17AM 11 a separate plan document. It's basically just  
11:17AM 12 summarizing things like how your salary is going to get  
11:17AM 13 set. Other aspects of it summarize a lengthy, formal  
11:17AM 14 plan document, it's not just PartnerPlus, there's other  
11:17AM 15 examples of that. So --

11:17AM 16 THE COURT: What are the other examples?

11:18AM 17 MR. STRIS: Oh, I cite -- I cite them in  
11:18AM 18 our brief. This changes from year to year.

11:18AM 19 In the 2010 document, I think I would  
11:18AM 20 need to take a break, Your Honor, and look at my brief  
11:18AM 21 to find it, but there is at least one other plan that's  
11:18AM 22 governed by a formal plan document and we refer to it  
11:18AM 23 in our supplemental brief.

11:18AM 24 THE COURT: It's not in this 2007?

11:18AM 25 MR. STRIS: I don't recall if it's in



11:18AM 1 the 2007 version. I know for sure it's in the -- it's  
11:18AM 2 in there by 2010.

11:18AM 3 THE COURT: The table of contents does  
11:18AM 4 not suggest one, but in any event, I understand what  
11:18AM 5 you're saying, that the term plan doesn't have a lot of  
11:18AM 6 formal legal meaning outside of ERISA.

11:18AM 7 MR. STRIS: And -- and -- and it's a  
11:18AM 8 plan. I'm not trying to suggest that this is not a  
11:18AM 9 plan. It describes -- and -- and -- as -- as UBS'  
11:18AM 10 corporate representative made clear, it describes all  
11:18AM 11 the different types of compensation a financial advisor  
11:18AM 12 would get. But -- but in that deposition, he also gave  
11:18AM 13 other testimony that I thought was very interesting and  
11:19AM 14 I wasn't going to mention it, but my -- my -- my friend  
11:19AM 15 from UBS brings it up.

11:19AM 16 He talks about how in some years there  
11:19AM 17 was actually a summary of the summary; in other words,  
11:19AM 18 he says this financial advisor compensation plan in  
11:19AM 19 some years, UBS circulated an even shorter summary that  
11:19AM 20 only described the key terms. And this, he's right,  
11:19AM 21 and I addressed this issue at the deposition and it's  
11:19AM 22 actually a -- a point that's very much in our favor,  
11:19AM 23 Your Honor.

11:19AM 24 What UBS' 30(b)(6) deponent testified to  
11:19AM 25 is, he said, oh, anything -- we wanted something to be

11:19AM 1 short and really drill down on the key terms of this  
11:19AM 2 compensation plan. So we would write a letter to all  
11:19AM 3 of the advisors saying, hey, you're going to get a  
11:19AM 4 summary, and one of them is marked as an exhibit to  
11:19AM 5 that deposition, and then we would give them a summary.

11:19AM 6 And I asked him, are all the key  
11:19AM 7 provisions of the compensation plan in that summary?  
11:19AM 8 And he said, yeah, if it's important, it's in there.  
11:19AM 9 Well, guess what's not in that summary? A dispute  
11:20AM 10 resolution provision. There's no arbitration  
11:20AM 11 provision. There's no mention of class waivers,  
11:20AM 12 nothing.

11:20AM 13 So the -- the -- the very summary of the  
11:20AM 14 summary that opposing Counsel brings up as a point in  
11:20AM 15 his favor, it actually cuts against the argument that  
11:20AM 16 anyone in our clients' position would look at this  
11:20AM 17 document and think that in the context of a claim under  
11:20AM 18 PartnerPlus, this -- somehow this arbitration provision  
11:20AM 19 was going to govern because it's a doubly whammy. A  
11:20AM 20 client would have to believe, number one, that the more  
11:20AM 21 specific document doesn't govern, even though this says  
11:20AM 22 otherwise. And then they'd have to look at their  
11:20AM 23 summary of all the key terms of this document and --  
11:20AM 24 and there'd be no mention whatsoever of dispute  
11:20AM 25 resolution to put them on notice that they might be

11:20AM 1 giving up such an important and substantial right.

11:20AM 2 THE COURT: All right. Let me hear from  
11:20AM 3 Mr. Scalia on this.

11:20AM 4 Thank you, Mr. Stris.

11:20AM 5 MR. STRIS: Thank you, Your Honor.

11:21AM 6 THE COURT: And Mr. Scalia, what I'd like  
11:21AM 7 to hear is your response to the argument that this  
11:21AM 8 arbitration clause has to give weight with -- with  
11:21AM 9 regard to PartnerPlus disputes to the arbitration  
11:21AM 10 clause in the PartnerPlus Plan and then we'll talk  
11:21AM 11 about the waiver separately. But I'm just talking at  
11:21AM 12 this point about the arbitration clause itself.

11:21AM 13 Do you dispute that the arbitration  
11:21AM 14 clause in the PartnerPlus Plan document would control  
11:21AM 15 over this for disputes about the PartnerPlus Plan?

11:21AM 16 MR. SCALIA: Your Honor, I -- I don't,  
11:21AM 17 but I don't think you need to reach that question  
11:21AM 18 either. So there is no conflict between the two.

11:21AM 19 Mr. Stris did two things. He utterly  
11:22AM 20 failed to actually address what this waiver language  
11:22AM 21 says. This waiver language says in court you won't  
11:22AM 22 participate in the class. That is the question before  
11:22AM 23 the Court today. This language plainly covers this  
11:22AM 24 case. The Plaintiff admitted it. Their complaint  
11:22AM 25 confirms it and Plaintiffs' Counsel hasn't denied it.

11:22AM 1 This case is that simple, Your Honor.

11:22AM 2 Now, Plaintiffs' Counsel, my colleague,  
11:22AM 3 did purport to identify what he thought were conflicts  
11:22AM 4 between the arbitration provision in PartnerPlus and  
11:22AM 5 the arbitration provision here. None of them are  
11:22AM 6 material. There was a reference to whether it should  
11:22AM 7 be, I think, New Jersey or New York law. There was a  
11:22AM 8 reference to whether you might go before a different  
11:22AM 9 arbitral body. There was a different -- a -- a  
11:22AM 10 reference to certain different resolution provisions.

11:22AM 11 Your Honor, there is only one document,  
11:23AM 12 one document, that governs what happens in disputes  
11:23AM 13 between former UBS employees, whether those disputes  
11:23AM 14 concern their employment or the termination of their  
11:23AM 15 employment and going to court. That is the provision  
11:23AM 16 we've put before you. There is simply no conflict  
11:23AM 17 whatsoever with a provision that addresses not court,  
11:23AM 18 but arbitration and --

11:23AM 19 THE COURT: It is part of what is  
11:23AM 20 apparently billed as the arbitration provision of this  
11:23AM 21 compensation plan. And you -- you are asking the Court  
11:23AM 22 to read that last sentence as a separate provision  
11:23AM 23 applicable to the entire contract, not simply a part of  
11:23AM 24 the arbitration.

11:23AM 25 MR. SCALIA: Absolutely, Your Honor.

11:23AM 1 This language does a couple of different things. It  
11:23AM 2 speaks to arbitration, but in the event you're in  
11:23AM 3 court, it also speaks to being in court. As I think  
11:24AM 4 you'll see, the provision acknowledges that there may  
11:24AM 5 be some claims that won't be in court -- or I'm sorry,  
11:24AM 6 that will be in court. There are always some claims  
11:24AM 7 that, for one special reason or another, can be in  
11:24AM 8 court and can't necessarily be subject to arbitration.  
11:24AM 9 This deals with those circumstances, when you happen to  
11:24AM 10 be in court, in that final sentence. There's simply no  
11:24AM 11 disputing that's how it operates.

11:24AM 12 THE COURT: But the PartnerPlus Plan  
11:24AM 13 arbitration clause, which of course, we contemplate the  
11:24AM 14 same thing, that not all disputes would be in  
11:24AM 15 arbitration.

11:24AM 16 MR. SCALIA: It -- it --

11:24AM 17 THE COURT: What does not address this?

11:24AM 18 MR. SCALIA: What -- it doesn't. It  
11:24AM 19 doesn't speak to what happens in court. There's only  
11:24AM 20 one document that does that, what a court is to do in  
11:24AM 21 the circumstance that you confront, which is you're in  
11:24AM 22 court, should you certify a class and that's no  
11:24AM 23 surprise, Your Honor. PartnerPlus is about  
11:25AM 24 arbitration. We're not in arbitration.

11:25AM 25 And the Federal Rules, those don't govern

11:25AM 1 what a Federal Judge is to do when confronted with a  
11:25AM 2 class certification question when a Plaintiff has  
11:25AM 3 signed a waiver agreement that is indisputably valid,  
11:25AM 4 you know, no claim of unconscionability or the like.

11:25AM 5 THE COURT: Well, you -- you do concede  
11:25AM 6 that you're asking the Court to read that last sentence  
11:25AM 7 as a free-standing provision of this plan and not  
11:25AM 8 simply as a part of the arbitration clause?

11:25AM 9 MR. SCALIA: It doesn't govern  
11:25AM 10 arbitration. It is part of a paragraph titled  
11:25AM 11 arbitration, but it's a sentence which addresses a  
11:25AM 12 different circumstance than arbitration. So generally  
11:25AM 13 it's contemplated that disputes will be in arbitration,  
11:25AM 14 but what this sentence accomplishes, and this was  
11:25AM 15 added, nothing wrong with that, this was added, signed  
11:25AM 16 2007, 2008, this addresses something additional.

11:25AM 17 We're not in arbitration. We're in  
11:25AM 18 court. There's a motion for class certification  
11:26AM 19 pending. What should happen? And there's a crystal  
11:26AM 20 clear answer; there is not conflict. Again, Mr. Stris  
11:26AM 21 was asked to identify conflicts. He talked about New  
11:26AM 22 York versus New Jersey law and different arbitral  
11:26AM 23 bodies. That -- none of that is relevant. There is no  
11:26AM 24 conflict. Your Honor --

11:26AM 25 THE COURT: It doesn't take a conflict,

11:26AM 1 does it? It simply takes a difference in order for  
11:26AM 2 the -- for the PartnerPlus Plan itself to govern.

11:26AM 3 MR. SCALIA: I -- I would agree that to  
11:26AM 4 the extent that the plans address different things,  
11:26AM 5 each controls the different thing it address.

11:26AM 6 PartnerPlus addresses arbitration. Now, we've  
11:26AM 7 separately explained to you why we believe that it  
11:26AM 8 incorporates by reference the arbitral language in the  
11:26AM 9 compensation clause, but that -- we didn't lean on  
11:26AM 10 that, Your Honor. We're not before you on that now.

11:26AM 11 This plan addresses a different thing and  
11:27AM 12 it's because they're different that there's no  
11:27AM 13 conflict. If there had been language in PartnerPlus  
11:27AM 14 about litigation in court saying that a Federal Judge  
11:27AM 15 must certify a case, or something of that nature, we'd  
11:27AM 16 have a different question. But it's simply not  
11:27AM 17 presented.

11:27AM 18 If I could address the -- unless there  
11:27AM 19 are any further questions, because obviously this  
11:27AM 20 specific question is the most important, but I have  
11:27AM 21 other points to make. Again, just to wrap up on that,  
11:27AM 22 the language is clear. It covers Plaintiffs' case,  
11:27AM 23 they admitted it. There is no conflict with the other  
11:27AM 24 language they've put before you and the only conflicts  
11:27AM 25 that their Counsel tried to identify are utterly

11:27AM 1 irrelevant to now that we're here in Federal Court with  
11:27AM 2 a motion for class certification.

11:27AM 3 Just a few other points that Your Honor  
11:27AM 4 asked about and -- and I think with your questions,  
11:27AM 5 Your Honor, it seemed to me that you've indicated that  
11:28AM 6 you got the nub of it, but these pages 19 through 22  
11:28AM 7 summarize the PartnerPlus Plan.

11:28AM 8 My colleague placed particular emphasis  
11:28AM 9 on paragraph 22 -- I'm sorry, the paragraph in 22 at  
11:28AM 10 the end, so let me come to that, because I think the  
11:28AM 11 footnote in 19 and this concluding paragraph in 22 are  
11:28AM 12 consistent. If there is any difference, there's not a  
11:28AM 13 difference, but if there's any difference between this  
11:28AM 14 summary and the plan document, the plan document will  
11:28AM 15 govern.

11:28AM 16 This summary is a summary of PartnerPlus.  
11:28AM 17 It's not a summary, obviously, of the entire document.  
11:28AM 18 That's why it talks about a conflict between this  
11:28AM 19 summary and the plan document. Now, I will note  
11:28AM 20 footnote 19 refers to the plan documents and there's a  
11:28AM 21 reason in that discussion between 19 and 22, they talk  
11:29AM 22 about something known as baby PartnerPlus, just  
11:29AM 23 briefly. It's on page 21. It's another deferred comp  
11:29AM 24 plan.

11:29AM 25 But Your Honor, this is very



11:29AM 1 self-contained, but at the end of the day, doesn't even  
11:29AM 2 matter because there's no conflict. The language is so  
11:29AM 3 clear that Plaintiffs' Counsel didn't want to ever talk  
11:29AM 4 about it in a -- in a -- in a context that is  
11:29AM 5 absolutely case dispositive.

11:29AM 6 Your Honor, you asked whether a plan had  
11:29AM 7 meaning apart from the ERISA context and -- and -- and  
11:29AM 8 respectfully it can. So even you don't -- if you don't  
11:29AM 9 have an ERISA plan, you would refer to a deferred  
11:29AM 10 compensation plan as a plan, even if everybody agreed  
11:29AM 11 and I think that Mr. Stris acknowledged that. I don't  
11:29AM 12 think it matters --

11:29AM 13 THE COURT: What's the legal  
11:29AM 14 significance of calling it a plan if it's not governed  
11:29AM 15 by ERISA?

11:29AM 16 MR. SCALIA: Directly for the question  
11:29AM 17 before you, there's not any. But I noted as a response  
11:30AM 18 to the suggestion that this is a summary and for some  
11:30AM 19 reason summary doesn't matter.

11:30AM 20 Mr. Stris referred to a document that was  
11:30AM 21 put before a 30(b)(6) witness which summarized  
11:30AM 22 provisions of the plan. Well, that was a summary.  
11:30AM 23 This is a plan. As he's admitted, this is the driver  
11:30AM 24 for what they're compensated for outside PartnerPlus  
11:30AM 25 and inside PartnerPlus. This is an important document.

11:30AM 1 Now, the fact that some summary document,  
11:30AM 2 which was a summary of compensation terms, Your Honor,  
11:30AM 3 did not also summarize an arbitration provision is  
11:30AM 4 irrelevant. They signed a provision not to bring a  
11:30AM 5 class action and simply because a summary of their  
11:30AM 6 compensation, it was a three or four page brochure  
11:30AM 7 didn't mention it, is of no legal weight whatsoever.

11:30AM 8 Mr. Stris also mentioned the conclusion,  
11:30AM 9 which is on page 27. Again, rather than talk about the  
11:30AM 10 language, rather than talk about his Plaintiffs'  
11:30AM 11 concession, rather than talk about how the language of  
11:31AM 12 this waiver matches perfectly with the language of the  
11:31AM 13 complaint arising from employment, arising from  
11:31AM 14 termination, rather than that, Plaintiffs' Counsel  
11:31AM 15 seized on the fact that the conclusion said this  
11:31AM 16 summarizes many, but not all, of the elements of your  
11:31AM 17 compensation. Well, it -- it -- it does summarize  
11:31AM 18 some. It sets forth others and establishes them and  
11:31AM 19 that is a reference to what it says as to compensation,  
11:31AM 20 not as to what it says about their agreement not to  
11:31AM 21 bring a class action in Federal Court.

11:31AM 22 Your Honor, I think this is extremely  
11:31AM 23 clear language which, among its many virtues, enables  
11:31AM 24 this Court to dispose of this case on a threshold issue  
11:31AM 25 that doesn't require addressing 23(a) or 23(b)(1),

11:31AM 1 (b)(1) or whatever other provisions you may have.

11:31AM 2 THE COURT: Let's move to the release  
11:31AM 3 language now that you have --

11:31AM 4 MR. STRIS: Your Honor, could I just  
11:31AM 5 make a brief point about the waiver? I -- because I  
11:32AM 6 found that language that you were asking about earlier.

11:32AM 7 THE COURT: When you get up to respond to  
11:32AM 8 the release, I'll give you a chance to --

11:32AM 9 MR. STRIS: Okay.

11:32AM 10 THE COURT: -- to address whatever you  
11:32AM 11 need on waiver as well.

11:32AM 12 And I guess one -- one issue that is  
11:32AM 13 paramount to me on this release question is whether or  
11:32AM 14 not there are provisions of ERISA that specifically the  
11:32AM 15 Plaintiff refers to the anti-alienation provisions and  
11:32AM 16 how those -- how you would have us deal with those  
11:32AM 17 regarding the release.

11:32AM 18 MR. SCALIA: Right. Your Honor, I -- I  
11:32AM 19 will be brief on the subject of the release. It's  
11:32AM 20 relevant in two respects.

11:32AM 21 First, one of the named Plaintiffs signed  
11:32AM 22 a release; he therefore can't go forward, he's an  
11:33AM 23 inadequate representative. But beyond that, Your  
11:33AM 24 Honor, a number of other punitive class members signed  
11:33AM 25 releases, which are not always identical, by the way,

11:33AM 1 to the one that he signed nor the circumstances of  
11:33AM 2 their signing necessarily identical and that is a  
11:33AM 3 question that makes typicality and adequacy for the  
11:33AM 4 others who didn't sign releases problematic as well  
11:33AM 5 because you'll have to probe into his individual cases  
11:33AM 6 and circumstances.

11:33AM 7 That's correct, there's an  
11:33AM 8 anti-alienation provision of ERISA that, essentially,  
11:33AM 9 once you're vested, you are entitled to it and it can't  
11:33AM 10 be alienated from you. However, that doesn't speak to  
11:33AM 11 the resolution of disputes and there's no general  
11:33AM 12 prohibition on ERISA of reaching a settlement agreement  
11:33AM 13 which compromises and waives claims. It's simply  
11:33AM 14 that's what Mr. Stacy did.

11:33AM 15 I -- I do have one case for you that I  
11:33AM 16 admit -- admit is not in my briefs. That's Johnson V.  
11:33AM 17 Kansas City, which is a Fifth Circuit decision, simply  
11:33AM 18 recognizing that you can, despite the anti-alienation  
11:34AM 19 provision, settle compromise a vested benefit claim.

11:34AM 20 THE COURT: And does the release that  
11:34AM 21 you're referring to call out ERISA as being released?

11:34AM 22 MR. SCALIA: I am not certain whether or  
11:34AM 23 not it does, Your Honor.

11:34AM 24 THE COURT: How would you characterize  
11:34AM 25 it as settlement of an ERISA claim if it doesn't --

11:34AM 1 MR. SCALIA: Because it's a settlement  
11:34AM 2 and release of all claims and as a result of that,  
11:34AM 3 naturally includes ERISA as well. And settlement are  
11:34AM 4 generally read that way, although they may call out  
11:34AM 5 specific laws, it's also recognized that they would  
11:34AM 6 include the other laws if the language is broad enough  
11:34AM 7 to do so in these releases. There's been no dispute  
11:34AM 8 that these releases are broad enough to have an effect.

11:34AM 9 THE COURT: This was a part of the  
11:34AM 10 severance of the employee that this release was  
11:35AM 11 executed?

11:35AM 12 MR. SCALIA: What happened, Your Honor,  
11:35AM 13 was that Mr. Stacy, before he left UBS, entered into a  
11:35AM 14 new position at the firm and in connection with that,  
11:35AM 15 he entered into a release of all claims that he had, up  
11:35AM 16 and to that point. And -- and so that's that release  
11:35AM 17 which we rest upon. Although we also, with our opening  
11:35AM 18 brief, submitted for the record releases that several  
11:35AM 19 other putative class members had entered as well.

11:35AM 20 THE COURT: And is this release a part  
11:35AM 21 of your exhibits?

11:35AM 22 MR. SCALIA: I beg your pardon, Your  
11:35AM 23 Honor?

11:35AM 24 THE COURT: Is the release, the Stacy  
11:35AM 25 release, a part of your exhibits?

11:35AM 1 MR. SCALIA: It is, Your Honor.

11:35AM 2 THE COURT: And --

11:35AM 3 MR. SCALIA: It's exhibit -- it's an  
11:35AM 4 exhibit to our opening brief. It's exhibit -- I  
11:35AM 5 believe it's Exhibit B.

11:36AM 6 THE COURT: All right.

11:36AM 7 MR. SCALIA: And -- and Your Honor, I  
11:36AM 8 apologize, I did not have the answer, but yes it does  
11:36AM 9 specifically release any claims or actions under the  
11:36AM 10 Employee Retirement Income Security Act. Although  
11:36AM 11 immediately following that are other releases. And  
11:36AM 12 again, they're different. I do believe they also --  
11:36AM 13 well, they do cover ERISA. I think at least some may  
11:36AM 14 specifically call it out, but numerous putative class  
11:36AM 15 members beyond Mr. Stacy do have releases, which  
11:36AM 16 because they do vary somewhat, it creates added  
11:36AM 17 complications for class certification.

11:36AM 18 THE COURT: Yeah, I -- and whether or  
11:36AM 19 not putative class members have released their claims,  
11:36AM 20 I don't think has a lot to do with certification.  
11:36AM 21 Whether a named Plaintiff has, may be more problematic.  
11:36AM 22 But in any event, I -- I understand your position on  
11:36AM 23 that.

11:36AM 24 MR. SCALIA: Your Honor, I was also  
11:36AM 25 prepared to address in-service distributions.

11:36AM 1 THE COURT: Let's -- let me get their  
11:37AM 2 response to release and whatever else he has to say  
11:37AM 3 about waiver and then we'll turn to the in-service  
11:37AM 4 distribution.

11:37AM 5 MR. SCALIA: Thank you, Your Honor.

11:37AM 6 THE COURT: Thank you.

11:37AM 7 MR. STRIS: Thank you, Your Honor. I  
11:37AM 8 promise to be brief on waiver, but I do have three  
11:37AM 9 things I wanted to say quickly.

11:37AM 10 The first one is, I mentioned earlier, in  
11:37AM 11 the 2010 summary brochure, there are actually three  
11:37AM 12 formal plan documents that are referred to and I would  
11:37AM 13 direct you to page 6 of our supplemental brief to get  
11:37AM 14 it in the record. There's a declaration from one of my  
11:37AM 15 associates attaching the relevant documents. And the  
11:37AM 16 2010 summary brochure, it includes references to the  
11:37AM 17 PartnerPlus Plan, the Survivor Benefit Plan and the  
11:37AM 18 Business Builder Plan.

11:37AM 19 And I actually think this is very  
11:37AM 20 important. It's kind of interesting because in one  
11:37AM 21 case, Your Honor, and that is the Survivor Plan, the  
11:38AM 22 language says: In the event of a conflict between the  
11:38AM 23 above summary of the Financial Advisor Survivor Benefit  
11:38AM 24 Plan document and the plan document itself, the plan  
11:38AM 25 document will control. But in the other two examples,

11:38AM 1 PartnerPlus and the -- the Business Builder Plan, it --  
11:38AM 2 it uses the more general language, which I think is  
11:38AM 3 further evidence of the point that when they were  
11:38AM 4 referring to summary, they were referring to the entire  
11:38AM 5 document. And again, I would reiterate, we just need  
11:38AM 6 to prove that that's a reasonable interpretation of the  
11:38AM 7 document.

11:38AM 8 Okay. So that's the first of the three  
11:38AM 9 things I wanted to briefly touch on.

11:38AM 10 The second is this: The -- the issue  
11:38AM 11 here about the summary brochure, is about what happens  
11:38AM 12 when there's -- this is -- this is my -- my opposing  
11:38AM 13 Counsel's comment, he says it's about what happens in  
11:38AM 14 disputes in court, not in arbitration. And I'd like to  
11:38AM 15 just clarify this issue for the Court.

11:38AM 16 Essentially what UBS, I think, is  
11:39AM 17 conceding is that if the PartnerPlus Plan said  
11:39AM 18 expressly in its arbitration provision, we preserve the  
11:39AM 19 right to class actions in ERISA cases, or I'll put it  
11:39AM 20 differently, we preserve the right and anyone who's  
11:39AM 21 complaining about PartnerPlus is permitted to bring a  
11:39AM 22 class action in court; other than that, everything  
11:39AM 23 needs to go to arbitration. What UBS is conceding is  
11:39AM 24 if the PartnerPlus Plan said that, well then in that  
11:39AM 25 case, you would have to defer to the language of the



11:39AM 1 PartnerPlus Plan, but not the summary brochure.

11:39AM 2 And they're resting their argument on the  
11:39AM 3 fact that they believe that the PartnerPlus Plan is  
11:39AM 4 silent and so, well, there's really no difference.  
11:39AM 5 They keep using this phrase. They keep saying the  
11:39AM 6 summary brochure is the only document that speaks to  
11:39AM 7 what happens in court. I think that exposes sort of  
11:39AM 8 the problem with their argument, which is this Court  
11:39AM 9 has already held at the arbitration stage, consistent  
11:39AM 10 with every Circuit Court, to have interpreted the  
11:39AM 11 language that UBS chose in its PartnerPlus Plan. That  
11:40AM 12 that provision did preserve the right to bring a class  
11:40AM 13 action in court.

11:40AM 14 So by incorporating the Federal Rules,  
11:40AM 15 UBS, they didn't have to do this, they drafted a  
11:40AM 16 PartnerPlus Plan that essentially said you have the  
11:40AM 17 right to bring a class action in court. So when  
11:40AM 18 there's a conflicting document that says you don't, you  
11:40AM 19 have to enforce one or the other and UBS gave clear  
11:40AM 20 instruction in the document itself as to which one to  
11:40AM 21 enforce.

11:40AM 22 Final point I want to make is -- goes to  
11:40AM 23 the questions you were asking opposing Counsel about  
11:40AM 24 whether they are separating the class action waiver  
11:40AM 25 from the arbitration provision and he says yes. He

11:40AM 1 says they can be separated. And I want to reiterate a  
11:40AM 2 point I made at the arbitration hearing because I think  
11:40AM 3 it is of utmost importance.

11:40AM 4 If that is their argument, if their  
11:40AM 5 argument is that the class action waiver in the summary  
11:40AM 6 brochure is a stand alone, then what they have just  
11:40AM 7 done is they've taken themselves outside the world of  
11:40AM 8 the Federal Arbitration Act, because they've said it's  
11:40AM 9 separate, and we then get to argue all the things that  
11:41AM 10 he -- he praised us for not arguing in the first place,  
11:41AM 11 namely that the class action waiver is invalid under  
11:41AM 12 state law.

11:41AM 13 So if this Court is inclined to accept  
11:41AM 14 their argument in any form, I would -- I would ask that  
11:41AM 15 we have the opportunity at that point to file  
11:41AM 16 supplemental briefing, because if this is a stand-alone  
11:41AM 17 class action waiver governed by either New Jersey,  
11:41AM 18 Texas, or New York law, then we have many arguments  
11:41AM 19 under state law as to why we believe it's unenforceable  
11:41AM 20 and we would have to have that opportunity.

11:41AM 21 Okay. Those are my three points on  
11:41AM 22 waiver. If you have no questions on that, I -- I  
11:41AM 23 will -- I'll turn to the issue of release.

11:41AM 24 THE COURT: Okay. Go ahead.

11:41AM 25 MR. STRIS: Okay. So I have three --

1 not much I want to say, I just want to make three brief  
2 points about the relief issue.

3 The first one is it's a -- from a  
4 procedural standpoint, in my view, it's really a  
5 nonissue. And what I would do is I would cite to the  
6 Court the Langbecker Fifth Circuit case that UBS has  
7 relied on throughout their briefs, they -- they think  
8 it's a very good case for them. Well, on page 313 of  
9 that opinion, here's what the Fifth Circuit says, and I  
10 quote: Without commenting further on the  
11 enforceability of the releases or application of the  
12 benefits exception, we note that holders of releases  
13 could become a subclass if a class action is otherwise  
14 deemed appropriate.

15 That's just black letter law, you know.  
16 At the end of the day, even if there were any validity  
17 to UBS' release argument, and we don't think there is,  
18 that would not warrant what they're saying, which is  
19 denial of the class certification motion; that could be  
20 dealt with through many procedural devices including  
21 making them a subclass pursuant to Rule 23(c).

22 The second point I wanted to make is as I  
23 understand the release, and I'm not exactly sure of the  
24 full scope of it, because this is their defense and  
25 they've put some into evidence, but they've kind of

11:42AM 1 cryptically suggested that there are many others.

11:42AM 2 Let's take Mr. Stacy's release. It's a preforfeiture

11:42AM 3 release. It's a release he signed before he ever left

11:43AM 4 and was denied his benefits under PartnerPlus.

11:43AM 5 So the notion that somehow by signing a

11:43AM 6 release before there was ever a forfeiture would

11:43AM 7 constitute him giving up his right to something where

11:43AM 8 the issue hadn't even perfected itself is odd to me and

11:43AM 9 it kind of bleeds into the final point, which is what

11:43AM 10 we rest on in our briefs, which is in the context of

11:43AM 11 ERISA, and they're claiming this is an ERISA release,

11:43AM 12 they -- they've said to look at the language and it's a

11:43AM 13 general release that among other things relate --

11:43AM 14 releases claims under ERISA. They run smack up against

11:43AM 15 the alienation provision.

11:43AM 16 And we don't have to resolve the merits

11:43AM 17 of that at this point. We can have a disagreement over

11:43AM 18 whether the release is enforceable, but that's just an

11:43AM 19 issue that would be amenable to class-wide treatment,

11:43AM 20 like many other issues that might come up in this

11:43AM 21 litigation.

11:43AM 22 I -- and I guess I would close by saying

11:43AM 23 I haven't heard anything from opposing Counsel to

11:43AM 24 suggest there's something about the nature of this

11:43AM 25 release at issue that would require individualized

11:43AM 1 determination. The only argument I understand them to  
11:44AM 2 be making is in the Eddington case, I -- perhaps  
11:44AM 3 there's some sort of suggestion that we would need a  
11:44AM 4 named Plaintiff who signed the release in order to have  
11:44AM 5 standing to bring the argument. I -- and so if  
11:44AM 6 essentially that's the position they're taking and you  
11:44AM 7 don't accept our other arguments, we -- we would -- we  
11:44AM 8 would request leave to amend and we will -- we will  
11:44AM 9 amend the complaint, add a named Plaintiff who signed  
11:44AM 10 the release. And if that's something they want to  
11:44AM 11 litigate, we're -- we look forward to litigating it  
11:44AM 12 because we're comfortable we're going to prevail on the  
11:44AM 13 merits, but I just don't see why it prevents the  
11:44AM 14 certification of the class at this point.

11:44AM 15 THE COURT: Okay. Thank you, Mr. Stris.

11:44AM 16 MR. SCALIA: Your Honor, just briefly  
11:44AM 17 regarding the waiver. My colleague mentioned a 2010  
11:44AM 18 document, but these Plaintiffs signed their waivers in  
11:44AM 19 2007, 2008, so I think that's a bit of a reach.

11:44AM 20 With regard to the arbitration provision,  
11:45AM 21 Your Honor, again, it's -- it's just this simple, that  
11:45AM 22 the class waiver talks about what a Court is to do when  
11:45AM 23 presented with a motion for class certification. No  
11:45AM 24 other document does. The Federal Rules merely indicate  
11:45AM 25 that the arbitration won't go forward pending a

11:45AM 1 decision on that, but they don't somehow establish some  
11:45AM 2 sort of indefeasible right to arbitration, nor could  
11:45AM 3 Federal Rules govern how an Article III court decides  
11:45AM 4 an issue of this nature.

11:45AM 5 Finally the provision the -- you don't  
11:45AM 6 need to get here because there's not the conflict --  
11:45AM 7 they've never really identified a conflict anyway, but  
11:45AM 8 the federal provision also says these subparagraphs do  
11:45AM 9 not otherwise affect the enforceability of any rights  
11:45AM 10 under the code or any other agreement.

11:45AM 11 THE COURT: All right.

11:45AM 12 MR. SCALIA: And then finally, Your  
11:45AM 13 Honor, Mr. Stris at the very end brought up this claim  
11:46AM 14 that, well, it might be not permissible to use this  
11:46AM 15 class waiver provision because of a -- it's an ERISA  
11:46AM 16 plan and maybe there's a conflict. That argument is  
11:46AM 17 not in their briefs. They made a very purposeful  
11:46AM 18 decision not to raise their so-called ERISA defense the  
11:46AM 19 way they did before in the motion to compel  
11:46AM 20 arbitration. It's way too late to go there.

11:46AM 21 But in any event, again, they haven't  
11:46AM 22 found the conflict. Recall when Mr. Stris was pressed  
11:46AM 23 to weigh down the conflicts, it was about New York  
11:46AM 24 versus New Jersey law or what arbitral form it'd be in.

11:46AM 25 Finally with respect to the release, Your

11:46AM 1 Honor, I think you've -- you've heard enough from us on  
11:46AM 2 that. We think that Mr. Stacy's release renders him  
11:46AM 3 inadequate and we believe that this is another of a  
11:46AM 4 number of issues that make this a difficult -- a very,  
11:46AM 5 very difficult case on manageability issues if we were  
11:46AM 6 to reach 23(b).

11:46AM 7 THE COURT: All right. And while you're  
11:46AM 8 up, Mr. Scalia, I have a question that came up with me  
11:46AM 9 during the briefing and I wanted to ask you. Do you  
11:47AM 10 contend that since the January 1, 2011, amendments to  
11:47AM 11 the PartnerPlus Plan that it is now a Top-Hat Plan  
11:47AM 12 under ERISA? And I guess I don't mean you, but does  
11:47AM 13 UBS contend that?

11:47AM 14 MR. SCALIA: Yes, that was the testimony  
11:47AM 15 of Mr. Levitan. It's a deferred compensation plan  
11:47AM 16 still, but a Top-Hat Plan is a very unique creature --

11:47AM 17 THE COURT: Okay.

11:47AM 18 MR. SCALIA: -- and we believe it's a  
11:47AM 19 deferred compensation plan that meets that ERISA  
11:47AM 20 Top-Hat definition.

11:47AM 21 THE COURT: And what changes were made  
11:47AM 22 to it in order to have it qualify as a Top-Hat?

11:47AM 23 MR. SCALIA: The number of people who  
11:47AM 24 could participate in the plan would substantially  
11:47AM 25 change and that's one of the defining features of a

11:47AM 1 Top-Hat Plan, as sort of the name itself would  
11:47AM 2 indicate.

11:47AM 3 THE COURT: Well --

11:47AM 4 MR. SCALIA: And -- and there were other  
11:47AM 5 changes, too.

11:47AM 6 THE COURT: What I'm getting at is that  
11:48AM 7 I -- I found their argument inquiry, which I'm sure you  
11:48AM 8 saw, as interesting that if you concede that by  
11:48AM 9 limiting the number of people involved, it became  
11:48AM 10 covered under ERISA's Top-Hat provision, how would it  
11:48AM 11 not have been covered under ERISA but not the Top-Hat  
11:48AM 12 provision before those changes?

11:48AM 13 MR. SCALIA: Well, several reasons, Your  
11:48AM 14 Honor. One is that, again, a Top-Hat Plan is a unique  
11:48AM 15 type of ERISA plan where you can have in-service  
11:48AM 16 distributions. And in fact, again, in the statute  
11:48AM 17 itself it's defined as a deferred compensation plan as  
11:48AM 18 opposed to a retirement plan. So that's one reason.

11:48AM 19 But there were other changes, as I  
11:48AM 20 mentioned, to a PartnerPlus. One of those was that you  
11:48AM 21 could defer back into the PartnerPlus Plan even to the  
11:49AM 22 point of retirement. The way the PartnerPlus worked  
11:49AM 23 until then was after 10 years, that money was  
11:49AM 24 distributed to you. It was yours and you couldn't put  
11:49AM 25 it back into PartnerPlus. Now you can and that changes



11:49AM 1 a bit how it functions.

11:49AM 2 Another change is that there became an  
11:49AM 3 ability to use PartnerPlus to invest in certain stock  
11:49AM 4 indices and the like. So there were a number of  
11:49AM 5 changes that did occur, but the restriction of the  
11:49AM 6 participants, the fact that a Top-Hat Plan is after all  
11:49AM 7 a deferred comp plan and then finally a redeferral into  
11:49AM 8 PartnerPlus, let me emphasize that, into PartnerPlus  
11:49AM 9 were all very significant changes.

11:49AM 10 THE COURT: All right. Thank you. I  
11:49AM 11 wanted to hear from you on that.

11:49AM 12 MR. SCALIA: So on the menu of issues,  
11:49AM 13 Your Honor, I had in-service distributions and we have  
11:49AM 14 23(b). I don't know if you'd like me to carry at this  
11:50AM 15 point or Mr. Stris or --

11:50AM 16 THE COURT: Go ahead and speak to the  
11:50AM 17 in-service distribution, that's fine.

11:50AM 18 MR. SCALIA: Your Honor, as the cases  
11:50AM 19 that we've identified indicate and as also our expert  
11:50AM 20 reports indicate, in-service distributions are  
11:50AM 21 incompatible with being an ERISA plan. And in fact,  
11:50AM 22 one of the two lead Plaintiffs, I believe it was Mr.  
11:50AM 23 Stacy himself, admitted that in-service distributions  
11:50AM 24 were inconsistent with being a retirement plan.

11:50AM 25 THE COURT: I mean, it's a matter of

11:50AM 1 degree, right? I mean, y'all don't contend that if  
11:50AM 2 there are any in-service distributions it can't be a  
11:50AM 3 retirement plan?

11:50AM 4 MR. SCALIA: Actually the exceptions are  
11:50AM 5 extremely rare. And what's interesting is the  
11:50AM 6 Plaintiffs were immediately alert to the only exception  
11:50AM 7 I'm aware of, which is that in a 401K plan when you hit  
11:51AM 8 59-and-a-half, you can take distributions out of your  
11:51AM 9 401K plan. But apart from that, it's just  
11:51AM 10 fundamentally inconsistent with being a retirement plan  
11:51AM 11 because the idea of a retirement plan is save money for  
11:51AM 12 retirement, accumulate earnings over time, and only  
11:51AM 13 take them at retirement; whereas, these plans worked to  
11:51AM 14 give very substantial current compensation. So these  
11:51AM 15 Plaintiffs received, in one case, more than \$500,000 in  
11:51AM 16 in-service distributions and that makes him a very poor  
11:51AM 17 person to present at argument this is really a  
11:51AM 18 retirement --

11:51AM 19 THE COURT: Well, even your own brief  
11:51AM 20 talks about the primary thrust of the plan needing to  
11:51AM 21 be retirement income under that Fifth Circuit's Murphy  
11:51AM 22 case, is that -- is that you?

11:51AM 23 MR. SCALIA: That -- that's correct.

11:51AM 24 THE COURT: So even if there are some  
11:51AM 25 in-service distributions, it's theoretically possible,

11:52AM 1 I'm not saying it exists here, but certainly possible  
11:52AM 2 that the primary thrust could be to provide retirement  
11:52AM 3 income, couldn't it?

11:52AM 4 MR. SCALIA: I'm sorry, for this plan?

11:52AM 5 THE COURT: No, for a plan. What I'm  
11:52AM 6 getting at is --

11:52AM 7 MR. SCALIA: Right.

11:52AM 8 THE COURT: -- I don't understand how you  
11:52AM 9 can argue that the test is what's the primary thrust of  
11:52AM 10 the plan and then say if there are any in-services  
11:52AM 11 distributions, it's -- it's not an ERISA retirement  
11:52AM 12 plan.

11:52AM 13 MR. SCALIA: Yeah. I think what I would  
11:52AM 14 say, Your Honor, is that a properly lawfully drawn  
11:52AM 15 retirement plan does not have in-service distributions,  
11:52AM 16 but the fact that an employer, for example, leaches out  
11:52AM 17 small amounts of in-service distributions can't be used  
11:52AM 18 to evade the protections of ERISA. So it's still  
11:52AM 19 inconsistent with being a retirement plan, but you  
11:52AM 20 wouldn't want a circumstance where when the primary  
11:52AM 21 dominating thrust is to provide for retirement, you  
11:52AM 22 don't have to comply with ERISA if you throw a few  
11:52AM 23 dollars here and there. But remember, our case is just  
11:53AM 24 totally different.

11:53AM 25 70 percent of the financial advisor plan

11:53AM 1 distributions, as our expert report showed, were  
11:53AM 2 in-service. And -- and again, we have Claimants here  
11:53AM 3 who received hundreds of thousands of dollars  
11:53AM 4 in-service, enjoyed that benefit, Your Honor, and now  
11:53AM 5 want to turn around and say, oh, I'm -- I'm -- I'm just  
11:53AM 6 shocked and dismayed. This was a retirement plan.  
11:53AM 7 They are poor protagonists for that position.

11:53AM 8 And if this case, obviously we believe it  
11:53AM 9 shouldn't be, but if it were certified, very inadequate  
11:53AM 10 representatives for that position given their own  
11:53AM 11 position, in a sense, their unclean hands. Remember,  
11:53AM 12 they want to proceed in equity while claiming this was  
11:53AM 13 for retirement and yet they took hundreds of thousands  
11:53AM 14 dollars presently, that makes them poor  
11:53AM 15 representatives.

11:53AM 16 THE COURT: I -- I think it's a reach to  
11:53AM 17 say that goes to the adequacy of their representation  
11:53AM 18 since all of the members of the class have been under  
11:54AM 19 the same plan, but --

11:54AM 20 MR. SCALIA: But Your Honor, not all  
11:54AM 21 enjoyed the fruits of in-service distribution. In  
11:54AM 22 fact, one of the named Plaintiffs did not, so --

11:54AM 23 THE COURT: Why did he not?

11:54AM 24 MR. SCALIA: Had to do with his tenure.

11:54AM 25 THE COURT: Okay. So in any event, I --

11:54AM 1 I do understand your argument about that and as I see  
11:54AM 2 it, it ties into the issue of whether or not this is  
11:54AM 3 actually the kind of plan that would be covered by  
11:54AM 4 ERISA, which I think is an issue on the merits and an  
11:54AM 5 issue that is going to turn on the -- all of the facts  
11:54AM 6 that are developed, not those simply known now and --  
11:54AM 7 but I understand your position on in-service  
11:54AM 8 distribution.

11:54AM 9 MR. SCALIA: And of course, part of our  
11:54AM 10 position, Your Honor, is that obviously these are  
11:55AM 11 merits principles, need to be considered to the extent  
11:55AM 12 relevant to certification and -- and the fact that they  
11:55AM 13 took all this money in service is incompatible with the  
11:55AM 14 ERISA argument they want to make down the road.

11:55AM 15 THE COURT: Okay.

11:55AM 16 MR. SCALIA: Thank you, Your Honor.

11:55AM 17 THE COURT: Thank you. Okay. Mr.  
11:55AM 18 Stris, I'd like to discuss a few questions with you.  
11:55AM 19 The -- I don't -- I think you briefed your position on  
11:55AM 20 the in-service distribution matter, but I -- you -- you  
11:55AM 21 didn't talk about in your briefs at all about 23(c)(4).  
11:55AM 22 The Plaintiffs have talked repeatedly about thinking  
11:55AM 23 that this case is primarily about three -- three  
11:55AM 24 questions all having to do with ERISA. If that's true,  
11:55AM 25 why shouldn't the Court simply certify this as a class

11:55AM 1 for those three issues?

11:56AM 2 MR. STRIS: So I'll speak to that  
11:56AM 3 directly. We have no objection to divided  
11:56AM 4 certification pursuant to Rule 23(c)(4) where you would  
11:56AM 5 certify, as per those three issues, a class pursuant to  
11:56AM 6 Rule 23(b)(2) and then the remaining issues would get  
11:56AM 7 certified pursuant to Rule 23(b)(3). We don't think  
11:56AM 8 that's necessary. That's something the Court could do  
11:56AM 9 in an abundance of caution, but I'd like to be clear on  
11:56AM 10 that point.

11:56AM 11 I was shocked when I read UBS' brief and  
11:56AM 12 they dropped one footnote in, said that -- oh, well,  
11:56AM 13 that's not permitted and then they cited a case that  
11:56AM 14 literally had nothing to do with that issue. I would  
11:56AM 15 point the Court to the Bolin case. It's a Fifth  
11:56AM 16 Circuit case that gets cited throughout the briefs.  
11:56AM 17 And in the Bolin case on page 976, the cite of Bolin  
11:56AM 18 just for --

11:56AM 19 THE COURT: I'm familiar --

11:56AM 20 MR. STRIS: Okay.

11:56AM 21 THE COURT: -- with the Bolin case and  
11:56AM 22 what Judge Higginbotham said about the -- the use of  
11:56AM 23 23(c)(4) in that case. I -- I am concerned that I  
11:57AM 24 don't know that you -- that your side is appreciating  
11:57AM 25 sufficiently how close a question is involved in

11:57AM 1 whether the monetary relief that your class members  
11:57AM 2 would receive if you win, how close the question is  
11:57AM 3 whether that monetary relief is merely incidental to  
11:57AM 4 the injunction or not and the fact that certifying a  
11:57AM 5 class under that could -- could end up being an issue  
11:57AM 6 that -- that causes the certification to be reversed on  
11:57AM 7 appeal and it's -- this is obviously going to be  
11:57AM 8 appealed.

11:57AM 9 And I -- I think that the Dukes case has  
11:57AM 10 to be read as at least injecting doubt on that. And I  
11:57AM 11 -- and that's one reason I -- I raise (c)(4) and I just  
11:58AM 12 want to hear from you on why 23(b)(3) wouldn't be a  
11:58AM 13 better way. And I know that that gets you into the, I  
11:58AM 14 guess, issues of predominance and --

11:58AM 15 MR. STRIS: Superiority, yes.

11:58AM 16 THE COURT: -- superiority that -- and is  
11:58AM 17 it your concern about those issues that's -- that's  
11:58AM 18 causing you to want to stick with (b)(2) or are you  
11:58AM 19 really worried that that many people are going to opt  
11:58AM 20 out of this class?

11:58AM 21 MR. STRIS: I -- I'd love to speak to  
11:58AM 22 that issue. I -- I certainly appreciate the close  
11:58AM 23 nature of the -- the importance of the question, I  
11:58AM 24 would put it that way, and it's something on which I  
11:58AM 25 have some fairly strong opinions and I'd like to share

11:58AM 1 them.

11:58AM 2                   So let me start by saying this: I have  
11:58AM 3 no doubt that the issue of whether 23(b)(2) classes can  
11:58AM 4 get certified in ERISA cases like this is going to  
11:59AM 5 continue to get litigated and it would not surprise me  
11:59AM 6 if it's made -- if it makes its way up to the Supreme  
11:59AM 7 Court. It is a critically important question that the  
11:59AM 8 defense lawyers are challenging in the wake of Dukes in  
11:59AM 9 case after case. I'm aware of that.

11:59AM 10                   But so far every Court that's decided the  
11:59AM 11 issue has decided it in, I believe, the correct way,  
11:59AM 12 which is that these cases should be certified under  
11:59AM 13 23(b)(2) and I'd like to explain why. So let's start  
11:59AM 14 with the Wal-Mart case.

11:59AM 15                   So the relevant language in the Wal-Mart  
11:59AM 16 case that opposing Counsel is referring to, it comes  
11:59AM 17 from page 2560 of the Supreme Court Reporter and it's  
11:59AM 18 where there -- ironically there's a discussion of a  
11:59AM 19 Fifth Circuit case, Allison versus Citgo Petroleum,  
11:59AM 20 that has the language that -- that -- that says that  
11:59AM 21 you can certify a 23(b)(2) class as long as the  
11:59AM 22 monetary relief is incidental. Now, to be sure, the  
11:59AM 23 Supreme Court in Wal-Mart did not sanction that.  
12:00PM 24 That's not my position. But the Supreme Court could  
12:00PM 25 not -- Justice Scalia could not have been clearer that



12:00PM 1 he was leaving that question open. So it may way --  
12:00PM 2 make its way back to the U.S. Supreme Court, I -- I  
12:00PM 3 don't deny that, but as of now this is still good law  
12:00PM 4 in the Fifth Circuit.

12:00PM 5 THE COURT: He went a little bit beyond  
12:00PM 6 leaving it open because the way he described what he  
12:00PM 7 was not deciding was whether there are any forms of  
12:00PM 8 incidental monetary relief that are consistent. I  
12:00PM 9 mean, he didn't go on to say that, you know, whether it  
12:00PM 10 was properly applied when Allison was the issue, but  
12:00PM 11 that's a fairly strong statement.

12:00PM 12 MR. STRIS: Well, and I think he would  
12:00PM 13 agree -- there's one thing I think he and I would agree  
12:00PM 14 on as to this issue which is whatever -- however strong  
12:00PM 15 the statement is, whatever he meant it is  
12:00PM 16 unquestionably dicta. And Justice Scalia has a very  
12:00PM 17 strong, and I've appeared before him a number of times,  
12:00PM 18 he has a very strong understanding and appreciation of  
12:01PM 19 the difference between holding and dicta. In fact, he  
12:01PM 20 dissented in Cigna versus Amara expressly on that basis  
12:01PM 21 because it was so important to him.

12:01PM 22 So I think we can all agree that whether  
12:01PM 23 it's a strong suggestion or not, it's dicta. What does  
12:01PM 24 that mean? What that means is as of now, this is the  
12:01PM 25 law in the Fifth Circuit. And you ask us why we want

12:01PM 1 this certified under 23(b)(2), there's a simple answer.  
12:01PM 2 It should be. It should be. If Plaintiffs have the  
12:01PM 3 right under the law to a certification under (b)(1) or  
12:01PM 4 (b)(2), they should not be required to get  
12:01PM 5 certification under (b)(3).

12:01PM 6 And if that means that I'm going to have  
12:01PM 7 to defend that on a 23(f) appeal to the Fifth Circuit,  
12:01PM 8 so be it. I look forward to that. Because I believe  
12:01PM 9 the right answer is precisely what Judge Posner put  
12:01PM 10 forward in the Johnson versus Meriter case. And UBS  
12:01PM 11 doesn't like it because it -- it -- it concludes the  
12:01PM 12 exact opposite of their position, but they don't have  
12:01PM 13 better authority in the Fifth Circuit.

12:01PM 14 They have the Allison case which says  
12:01PM 15 it's permissible and sets forth this test. And then in  
12:01PM 16 the Seventh Circuit they have the Meriter case that  
12:01PM 17 says, you know what, if you have an ERISA case, and  
12:02PM 18 this comes up a lot, this case is a paradigmatic  
12:02PM 19 example, if you have an ERISA case where the challenge  
12:02PM 20 conduct is class wide, and that's the issue here,  
12:02PM 21 either the forfeitures are invalid or they're not,  
12:02PM 22 Plaintiffs get to say that it doesn't matter how much  
12:02PM 23 monetary relief there is, they seize upon this point,  
12:02PM 24 there -- they say how could the monetary relief be  
12:02PM 25 incidental if it's hundreds of millions of dollars?

12:02PM 1 I'll tell you why because the difference between a  
12:02PM 2 (b)(1) and a (b)(2) class on the one hand and (b)(3)  
12:02PM 3 class on the other has nothing to do with how much  
12:02PM 4 money is involved. It has to do with whether the  
12:02PM 5 issues are individualized.

12:02PM 6                   When -- when -- when this rule was  
12:02PM 7 created, it was because there was a concern that if you  
12:02PM 8 have individualized monetary determinations, it's  
12:02PM 9 critically important to provide opt out rights and --  
12:02PM 10 and that makes sense. Because if I'm one member of the  
12:02PM 11 class, I -- I -- and I have individual issues about  
12:02PM 12 what my damages are, I may not want some named  
12:02PM 13 Plaintiff and his or her lawyers litigating that issue  
12:02PM 14 because their interest may be divergent from mine.  
12:03PM 15 That does not present itself, Your Honor, in ERISA  
12:03PM 16 cases where you're challenging something plan wide.

12:03PM 17                   So that's why Judge Posner correctly  
12:03PM 18 explained in Meriter that in a case like this where if  
12:03PM 19 we get our injunction, then it's just a matter of  
12:03PM 20 laying out the records. And UBS has no response to  
12:03PM 21 this. They lay out the records. They know full well  
12:03PM 22 who the participants are. They know how much they  
12:03PM 23 would get if the plan is an ERISA plan and they weren't  
12:03PM 24 allowed to do these forfeitures. It's a ministerial,  
12:03PM 25 administrative calculation and there's no reason to --

12:03PM 1 to force mandatory opt outs and make us get a 23(b)(3)  
12:03PM 2 class certified in that case.

12:03PM 3 And so I have no doubt that this is a  
12:03PM 4 question on which people will disagree. It will be  
12:03PM 5 hotly litigated, but we believe that the law is clear.  
12:03PM 6 If -- if we're right, we have -- we -- we are entitled  
12:03PM 7 to certification under 23(b)(2) and we'll be happy to  
12:04PM 8 litigate that before the Fifth Circuit, come what may.

12:04PM 9 THE COURT: All right. Thank you, Mr.  
12:04PM 10 Stris, I appreciate that position.

12:04PM 11 Mr. Scalia, do you want to respond? And  
12:04PM 12 I -- by that I mean to the entire 23(c)(4) and (b)(2)  
12:04PM 13 or (b)(3) subjects.

12:04PM 14 MR. SCALIA: Your Honor, with respect to  
12:04PM 15 (b)(2) itself, Plaintiffs have again changed their  
12:04PM 16 position on Dukes itself. Their opening brief, I  
12:04PM 17 mentioned, it cited Dukes once and got it wrong. They  
12:04PM 18 cited it for a proposition, Your Honor, that you've  
12:04PM 19 obviously recognized, it certainly does not stand for.  
12:04PM 20 They suggested that it had approved, endorsed, and  
12:04PM 21 accepted the Allison approach; but as you know, the  
12:05PM 22 Court consciously not only set that aside, but  
12:05PM 23 suggested very serious misgivings about it. So I do  
12:05PM 24 appreciate that we're now on a common ground as to what  
12:05PM 25 happened in Dukes that reflects, again, that you've

12:05PM 1 been presented by Plaintiffs a road map to class  
12:05PM 2 certification that's ultimately unreliable and  
12:05PM 3 unsustainable.

12:05PM 4 As to whether this is a (b)(2) case, what  
12:05PM 5 you've heard from Plaintiffs' Counsel who, you know,  
12:05PM 6 has followed this case closely, he's a capable lawyer,  
12:05PM 7 what you've heard is this is a very close call. What I  
12:05PM 8 would suggest is that it clearly is not within (b)(2),  
12:05PM 9 but in any event is a bad test case for the approach  
12:05PM 10 that he would urge to (b)(2).

12:05PM 11 He cited the Johnson case. That's the  
12:05PM 12 Judge Posner decision again, which reflects a Seventh  
12:05PM 13 Circuit approach toward class certification, which is  
12:05PM 14 not the approach taken here. Judge Posner did not  
12:05PM 15 purport to fit what he was doing there within the  
12:05PM 16 Allison rule, but there's something else that's very  
12:05PM 17 important in that case, that is a thread that runs  
12:06PM 18 through Allison, Bolin, and also Casa Orlando, all on  
12:06PM 19 23(b)(2), all cases that we cited.

12:06PM 20 I've mentioned this earlier, but on page  
12:06PM 21 369 what Posner said, he referred to, quote, those  
12:06PM 22 class members who have not yet quit or retired from  
12:06PM 23 Meriter who are seeking forward-looking relief as  
12:06PM 24 distinct from damages.

12:06PM 25 In Allison as well, even though the Court

12:06PM 1 there ultimately did not find (b)(2) was appropriate,  
12:06PM 2 you had people who at least were seeking bona fide  
12:06PM 3 injunctive relief in its own right. They wanted  
12:06PM 4 employment, they wanted promotion and the like, so you  
12:06PM 5 had something to balance.

12:06PM 6 On the other side you have Bolin -- I'm  
12:06PM 7 sorry, Bolin and Casa Orlando where in those cases the  
12:06PM 8 Court says we really don't need to get into a balancing  
12:06PM 9 between injunctive and -- and whether the monetary  
12:07PM 10 relief is incidental or not because the injunctive  
12:07PM 11 relief is effectively illusory. And of course, Bolin  
12:07PM 12 has that very important line about how (b)(2) is not to  
12:07PM 13 be used merely to provide injunctive relief as a means  
12:07PM 14 of distributing money.

12:07PM 15 I think we've now handed up to you this,  
12:07PM 16 again, would be PowerPoint, a hard copy document titled  
12:07PM 17 we want money and Plaintiffs should have a copy of this  
12:07PM 18 as well. Yes. And so what we have there is first a  
12:07PM 19 line from Bolin at the bottom about how (b)(2) can't be  
12:07PM 20 used when Plaintiffs, quote, have nothing to gain from  
12:07PM 21 an injunction and the declaratory relief they seek  
12:07PM 22 serves only to facilitate the award of damages, end  
12:07PM 23 quote.

12:07PM 24 That's what Plaintiffs want here. That's  
12:07PM 25 why they want the injunction. Again, that wasn't true

12:07PM 1 in Johnson, even though Johnson itself isn't following  
12:07PM 2 the Allison, Bolin, Casa Orlando line of cases. And  
12:07PM 3 then of course on this slide we have Plaintiffs'  
12:08PM 4 Counsel admission in the prior hearing, they're after  
12:08PM 5 the money. And the lead Plaintiff in the Eddingston  
12:08PM 6 case saying what he wants is an order to pay money.

12:08PM 7 So we think that no monetary relief is  
12:08PM 8 appropriate through a (b)(2) class, which as you know  
12:08PM 9 raises all sorts of questions ultimately about due  
12:08PM 10 process, which the Court was identifying in Dukes. But  
12:08PM 11 beyond that, this is a particularly poor case for that  
12:08PM 12 vehicle.

12:08PM 13 To just briefly address (b)(1)(a) and  
12:08PM 14 (b)(1)(b), Your Honor with respect to (b)(1)(a), the  
12:08PM 15 Casa Orlando case is -- is really on point and, you  
12:08PM 16 know, we cite it, but (b)(1)(a) is limited to those  
12:08PM 17 circumstances where one Court might say go left and the  
12:08PM 18 other Court would say go right and you can't do both.  
12:08PM 19 But a circumstance where one Court says this is an  
12:08PM 20 ERISA plan and another Court says it's not, doesn't put  
12:08PM 21 the Defendant in that difficult position.

12:08PM 22 THE COURT: How not?

12:08PM 23 MR. SCALIA: Well, because see, Your  
12:08PM 24 Honor, the dilemma is one Court again is saying go left  
12:09PM 25 and the other is saying you may not go left, you must

12:09PM 1 go right. The Court that says this isn't an ERISA plan  
12:09PM 2 isn't going to say, and you may not treat it like one,  
12:09PM 3 but it's going to say it's not ERISA, Plaintiff loses.  
12:09PM 4 So you can be consistent with both by adapting your  
12:09PM 5 conduct to the order of the Court that held that it was  
12:09PM 6 an ERISA plan.

12:09PM 7                   You're not between a rock and a hard  
12:09PM 8 place the way Casa Orlando says that (1)(a) is limited  
12:09PM 9 to. So Plaintiffs cited their cases on (1)(a), they  
12:09PM 10 all predate Casa Orlando and a number of them are out  
12:09PM 11 of the circuit, they simply misunderstand. And I  
12:09PM 12 believe it's Judge Higginbotham, in Casa Orlando, as  
12:09PM 13 well is really quite clear about that and he's  
12:09PM 14 absolutely right, that's -- that -- that's how it  
12:09PM 15 operates.

12:09PM 16                   In terms of (b)(1)(b), again a shift.  
12:09PM 17 When you read their opening briefs, Plaintiffs cite  
12:09PM 18 Amcan, which is a (b)(3) case, to suggest that (1)(b)  
12:09PM 19 is sort of an open door to any kind of certification.  
12:09PM 20 And then they acknowledge finally it's limited to its  
12:10PM 21 historical antecedents, but they say not only to the  
12:10PM 22 limited fund problem, but then they do not tell you  
12:10PM 23 what historical antecedents fit.

12:10PM 24                   So just brief on (1)(a) and (1)(b), but  
12:10PM 25 you don't fit there.



12:10PM 1 THE COURT: Why shouldn't the Court, if  
12:10PM 2 I adopt your approach to the monetary relief, simply  
12:10PM 3 certify for class determination the ERISA questions  
12:10PM 4 that the Plaintiffs put forth?

12:10PM 5 MR. SCALIA: First, Your Honor, because  
12:10PM 6 I don't believe they've asked for that. I don't  
12:10PM 7 believe it's in their brief. They never asked for that  
12:10PM 8 and the Plaintiffs ought to be held to relief they  
12:10PM 9 requested.

12:10PM 10 Secondly, we simply think it's  
12:10PM 11 inappropriate. That each of those rules reflects a  
12:10PM 12 very thoughtful approach to how to deal with a  
12:10PM 13 particular type of case and it's not in the proper use  
12:10PM 14 of Rule 23 to break it down into different parts --

12:10PM 15 THE COURT: Well, what's -- what is  
12:10PM 16 (c)(4) about? That's part of Rule 23.

12:11PM 17 MR. SCALIA: It -- it, for example,  
12:11PM 18 could authorize subclasses, classes as to different  
12:11PM 19 claims, but I don't think it should be read to  
12:11PM 20 authorize taking a specific case and slicing and dicing  
12:11PM 21 it to fit different particular provisions in 23(b)  
12:11PM 22 itself. And -- and -- and I don't believe that's  
12:11PM 23 ultimately what was done. In the Bolin case there's  
12:11PM 24 very brief reference to it, but it wasn't ultimately  
12:11PM 25 used in that manner.

12:11PM 1 THE COURT: Well, I think that Judge  
12:11PM 2 Higginbotham clearly pointed out that it could be used  
12:11PM 3 in that manner. I mean, how can you say that (c)(4)  
12:11PM 4 which says when appropriate, an action may be brought  
12:11PM 5 or maintained as a class action with respect to  
12:11PM 6 particular issues, how can you say that doesn't  
12:11PM 7 authorize the Court to certify a class as to particular  
12:11PM 8 issues?

12:11PM 9 MR. SCALIA: It -- it authorizes  
12:11PM 10 certifying as to particular issues, but not breaking 23  
12:11PM 11 down into different component parts and having a hybrid  
12:12PM 12 type action, which is really neither fish nor foul and  
12:12PM 13 the Court really wanted very specific protections.

12:12PM 14 THE COURT: You're assuming that -- that  
12:12PM 15 I'm talking about certifying the monetary relief for  
12:12PM 16 class determination at this point also, huh? I'm  
12:12PM 17 asking you about if all that got certified was the --  
12:12PM 18 whether or not this plan is covered by ERISA, whether  
12:12PM 19 or not, if so it would be a Top-Hat plan, and whether  
12:12PM 20 or not the plans vesting in forfeiture provisions are  
12:12PM 21 in compliance with ERISA, why shouldn't those issues be  
12:12PM 22 certified for class determination?

12:12PM 23 MR. SCALIA: Just as an initial  
12:12PM 24 observation, Your Honor, these are interesting and some  
12:12PM 25 cases might be challenging questions, but a nice thing

1 about this case is that the waiver means you don't need  
2 to reach them and we don't need to have such an  
3 adventuresome class action certified. But as to that  
4 approach, what you'd be talking about then is having  
5 what Plaintiffs maintain as the central issue in this  
6 case, whether or not it's an ERISA plan, done under  
7 (b)(2) presumably with no notice and -- and because  
8 (b)(2) doesn't provide opt out and so you would have  
9 that central issue determined unbeknownst to all of  
10 these other people capable of bringing claims on their  
11 own.

12 THE COURT: Notice can provided in a  
13 (b)(2) class. The rules are specific on that.

14 MR. SCALIA: But typically that occurs  
15 late in the class. But in any event, there's not an  
16 opt out mechanism in (b)(2), so --

17 THE COURT: There's no opt out.

18 MR. SCALIA: -- so at that point you're,  
19 in charging this group, and we've already talked about  
20 the inadequacies they present as Plaintiffs, this group  
21 to litigate for almost 2000 people, claims that in some  
22 instances are hundreds of thousands of dollars by  
23 themselves. We already have Claimants who've either  
24 brought cases in Federal District Court or sought to  
25 have brought cases in arbitration. At this point we're

12:14PM 1 believing that in the even of (b)(3) Your Honor, but --  
12:14PM 2 and -- and superiority. But there are so many reasons  
12:14PM 3 why individuals who are concerned about this can  
12:14PM 4 proceed on their own and do not need and should not  
12:14PM 5 have it inflicted upon them that without their ability  
12:14PM 6 to control litigation of this particular set of  
12:14PM 7 Claimants determines the central question in the case  
12:14PM 8 pursuant to (b)(2). We think that would be a misuse of  
12:14PM 9 it.

12:14PM 10 Finally --

12:14PM 11 THE COURT: Do you have any authority  
12:14PM 12 that would indicate that just because it's a serious  
12:14PM 13 question that a lot of absent class members would have  
12:14PM 14 a serious interest in that it shouldn't be certified?

12:14PM 15 MR. SCALIA: I think that the text of  
12:14PM 16 (b)(2) and -- and -- and, for that matter, (b)(1) and  
12:14PM 17 (b)(3), which presented a very conscious sort of  
12:14PM 18 purposeful approach toward class certification in  
12:14PM 19 different kinds of circumstance is part of the answer.  
12:14PM 20 And I think the rest of the answer is Dukes, which  
12:15PM 21 expressed a very serious concern in line with the  
12:15PM 22 Schutz case and Ortiz and others about mandatory  
12:15PM 23 classes which are determinative of monetary relief and  
12:15PM 24 that is what you'd still be doing because you'd still  
12:15PM 25 be having --

12:15PM 1 THE COURT: You seem to be admitting  
12:15PM 2 that it's incidental monetary relief, then, if you're  
12:15PM 3 saying that the mere fact that you decide the question  
12:15PM 4 decides the monetary relief.

12:15PM 5 MR. SCALIA: Oh, I don't dispute for a  
12:15PM 6 minute that the only reason they want a ruling on their  
12:15PM 7 so-called injunction is to get money. I mean, as we've  
12:15PM 8 said, it's -- if -- it is all about the money. What I  
12:15PM 9 dispute is whether it's incidental. It's entire and  
12:15PM 10 predominant and whole that what they want is the money  
12:15PM 11 and that's exactly why (b)(2) is wrong, because they'd  
12:15PM 12 be saying, oh, it's just (b)(2) as to whether or not  
12:15PM 13 it's an ERISA plan, but really what they want is (b)(2)  
12:15PM 14 so that they can then, contrary to Bolin, contrary to  
12:16PM 15 Casa Orlando, use that as a means of disbursing cash  
12:16PM 16 and that's not appropriate.

12:16PM 17 Finally, Your Honor, with respect to  
12:16PM 18 (b)(3) and the manageability -- and by the way, this  
12:16PM 19 goes to (b)(2) also. You read Plaintiffs' brief and  
12:16PM 20 some of their exhibits and part of what they've relied  
12:16PM 21 on is what was told to different class members. So  
12:16PM 22 there's one fellow, Ellspermann, who was deposed  
12:16PM 23 because he'd been identified as a potential witness.  
12:16PM 24 They've used his deposition, the Plaintiffs themselves.  
12:16PM 25 There's another person, Mendenhall, deposed.

12:16PM 1                   These folks talked about what people in  
12:16PM 2                   low-level management positions at UBS are supposedly  
12:16PM 3                   told about the retirement plan. Plaintiffs regard that  
12:16PM 4                   as essential to determining whether or not this is a  
12:16PM 5                   retirement plan. That is part of the aggregation of  
12:16PM 6                   facts which Plaintiffs are saying are needed.

12:16PM 7                   So what you're talking about is -- and by  
12:16PM 8                   the way, Ellspermann said he told hundreds of people it  
12:16PM 9                   was a retirement plan; now he also admitted he didn't  
12:17PM 10                  know what retirement was. But he said he told hundreds  
12:17PM 11                  of people. So I gather Plaintiffs envision a case  
12:17PM 12                  where hundreds of people will be brought forward to  
12:17PM 13                  say, ah, that's what's Ellspermann told me, which of  
12:17PM 14                  course, entitles us to depose every one of them, to  
12:17PM 15                  cross-examine every one of them, and then to go seek  
12:17PM 16                  out our own several hundred or perhaps a thousand  
12:17PM 17                  Plaintiffs, putative class members, who say I knew it  
12:17PM 18                  wasn't a retirement plan. It's a deferred compensation  
12:17PM 19                  plan.

12:17PM 20                  That is not a manageable class action  
12:17PM 21                  whatsoever. And so their own theory of how this ERISA  
12:17PM 22                  question gets litigated, Your Honor, is not consistent  
12:17PM 23                  at all with their so-called three questions.

12:17PM 24                  In fact, you know, rereading their briefs  
12:17PM 25                  last night, I was really struck on page 23. They said

1 on predominance the central task is just to think about  
2 how a trial on the merits would be conducted. And they  
3 said individual factual determinations will be  
4 unnecessary. Each member seeks relief on claims  
5 arising from the same conduct. Each member was treated  
6 identically. And each member was subject to the same  
7 plan. Common issues do not merely predominate, they  
8 are the only ones.

9 And yet now they -- they're offering you  
10 a completely different case of literally hundreds of  
11 people that are supposed to be heard from about whether  
12 or not they were told that it was a retirement plan.

13 THE COURT: I don't really think there's  
14 any reliance issue in here. I -- they may think that  
15 it's helpful to show that UBS people themselves thought  
16 it was a retirement plan, but the fact that they're  
17 referring to these statements that some of the class  
18 members heard, is -- it's not a reliance type issue  
19 like you get into in a RICO or fraud class action.

20 MR. SCALIA: But Your Honor, with  
21 respect to the statute of limitations accrual, with  
22 respect potentially to releases, with respect to  
23 Plaintiffs who moved among different states, if  
24 Plaintiffs were to have their way on which limitations  
25 period applies, all of these are issues that would have

12:19PM 1 you drilling down in a highly individualized fact  
12:19PM 2 specific way that's inconsistent with (b)(2) and (b)(3)  
12:19PM 3 and I take your point. It's not -- it's not so much  
12:19PM 4 reliance, but it's Plaintiffs that put weight on what  
12:19PM 5 was told to class members.

12:19PM 6 And we couldn't do our jobs without  
12:19PM 7 finding out what was told to all the other class  
12:19PM 8 members and then calling them as witnesses. And that  
12:19PM 9 is an entirely unmanageable trial and -- entirely  
12:19PM 10 unmanageable trial and -- and not superior to these  
12:19PM 11 people receiving their sizable claims brought by  
12:19PM 12 their --

12:19PM 13 THE COURT: If this -- if the case was  
12:19PM 14 tried on an individual basis, there's no reason all  
12:19PM 15 those hundreds of people would still not be relevant to  
12:19PM 16 the question of ERISA coverage.

12:19PM 17 MR. SCALIA: I -- I think it's highly  
12:19PM 18 unlikely you would have a case of that nature. At --  
12:20PM 19 at -- at minimum it would be, you know, courts could  
12:20PM 20 put reasonable limits on it. It would be much more  
12:20PM 21 manageable and what somebody on the other side of the  
12:20PM 22 country thought about any particular Claimant is not  
12:20PM 23 going to be -- or for that matter, the other side of  
12:20PM 24 the state, is not going to be relevant in an individual  
12:20PM 25 case, but necessarily becomes part of the evidence that



12:20PM 1 goes into -- into one of these cases.

12:20PM 2 THE COURT: Okay. I hear you.

12:20PM 3 MR. SCALIA: Last point, Your Honor.

12:20PM 4 Just a couple last points. With regard to the state  
12:20PM 5 law claim, the -- the Plaintiffs, I think, have all but  
12:20PM 6 waived any attempt to certify the state law claim.  
12:20PM 7 They just dropped a footnote in their first brief  
12:20PM 8 saying and for all the reasons therefore given as to  
12:20PM 9 ERISA, certify the state claim too. Completely  
12:20PM 10 different issues are presented.

12:20PM 11 They've identified no way in which what's  
12:20PM 12 a reasonable scope of a competition restriction could  
12:20PM 13 appropriately be determined on a class basis and for  
12:20PM 14 that reason certification is inappropriate.

12:20PM 15 Finally Your Honor, in the Castano case,  
12:21PM 16 84 F.3d 734, sounds like you got there before I did,  
12:21PM 17 Your Honor, the Fifth Circuit has said that (c)(4) is  
12:21PM 18 not an independent basis for certification. Plaintiffs  
12:21PM 19 haven't asked for it, shouldn't be done. They should  
12:21PM 20 be held to their papers, Your Honor.

12:21PM 21 THE COURT: Well, I think that (c)(4) is  
12:21PM 22 not independent and what the Court meant in Castano is  
12:21PM 23 that it doesn't get you out of fitting it within (b)(1)  
12:21PM 24 through (3), but it does make clear that it doesn't  
12:21PM 25 have to be an entire case certified. It can be

12:21PM 1 discreet issues. And I don't think Castano in any way  
12:21PM 2 changes that, but anyway, I -- I will look at Castano  
12:21PM 3 again.

12:21PM 4 MR. SCALIA: Right. But I don't think  
12:21PM 5 what it says is you can certify under (c)(4) and then  
12:21PM 6 use it in conjunction with all the other rules, rather  
12:21PM 7 than just have a case about an issue, end of story.

12:22PM 8 THE COURT: Mr. Stris, I want to start  
12:22PM 9 with maybe where we ended up there. I don't see how I  
12:22PM 10 could possibly certify a class on the Texas claims  
12:22PM 11 based on the record that's been made here.

12:22PM 12 MR. STRIS: I agree.

12:22PM 13 THE COURT: Okay. All right.

12:22PM 14 MR. STRIS: Subject to the fact that we  
12:22PM 15 have the right to move for a certification early in the  
12:22PM 16 proceedings and if at some point in the future the case  
12:22PM 17 is decided such that ERISA is not covered, we -- you  
12:22PM 18 know, we -- we reserve the right to move for class  
12:22PM 19 certification on the Texas claims then, but I agree  
12:22PM 20 with opposing Counsel and -- and your point.

12:22PM 21 THE COURT: All right.

12:22PM 22 MR. STRIS: With that said, I'd like to  
12:22PM 23 kind of jump into some of the positions, some of the  
12:22PM 24 points made by opposing Counsel. And I'd like to start  
12:22PM 25 with this idea of divided certification, if I may.

12:22PM 1 When -- when we asked, you know, my  
12:23PM 2 friends' side opposite about what his position was  
12:23PM 3 about divided certification, I was surprised again.  
12:23PM 4 His first answer was we didn't ask for it and it's  
12:23PM 5 waived. I -- I keep hearing this again and again. So  
12:23PM 6 just in the interest of completeness, if you look at  
12:23PM 7 our original class --

12:23PM 8 THE COURT: I don't consider that you've  
12:23PM 9 waived it, so --

12:23PM 10 MR. STRIS: Okay. But I'd like to be  
12:23PM 11 clear about where we said it, because it makes it clear  
12:23PM 12 about what we said. On page 12 of our class  
12:23PM 13 certification motion, in footnote 10, we said: In the  
12:23PM 14 event the Court is concerned that some individual  
12:23PM 15 members may be harmed by class-wide monetary relief,  
12:23PM 16 the Court can order divided certification of  
12:23PM 17 Plaintiffs' class. We cite Meriter.

12:23PM 18 And here's what I really want to get to.  
12:23PM 19 I want to explain -- actually want to quote exactly  
12:23PM 20 what Judge Posner said in Meriter because it explains  
12:23PM 21 the precise mechanics under Rule 23 about how this  
12:23PM 22 would happen. And -- and we have this in our opening  
12:23PM 23 brief.

12:23PM 24 Judge Posner says, quote: This would  
12:23PM 25 mean -- I'm actually going read the full quote, we --

12:23PM 1 we excerpted it in the brief. The full quote says: In  
12:24PM 2 the present case, bifurcation, called divided  
12:24PM 3 certification in a class action context, would mean a  
12:24PM 4 (b)(2) proceeding first and if the Plaintiffs obtained  
12:24PM 5 declaratory relief, a (b)(3) proceeding where notice  
12:24PM 6 and the right to opt out are mandatory to follow.  
12:24PM 7 That's his exact quote.

12:24PM 8 Now, we don't want that. We believe  
12:24PM 9 we've satisfied the requirements under Rule 23(b)(2)  
12:24PM 10 and we'd like 23(b)(2) certification, we think we're  
12:24PM 11 entitled to it. But should this Court disagree,  
12:24PM 12 there's no question, I think, as Bolin and other cases  
12:24PM 13 make clear, that Rule 23(c) -- our position is not that  
12:24PM 14 Rule 23(c) is some sort of independent basis for  
12:24PM 15 certification, it's exactly what you said a moment  
12:24PM 16 earlier, Your Honor. It permits as long as we've met  
12:24PM 17 the requirements under Rule 23 -- 23(b)(2) and 23(b)(3)  
12:24PM 18 for you to separate out, just as Judge Posner suggested  
12:24PM 19 could have happened in the Meriter case. So I want to  
12:24PM 20 just make that clear with regard to our position on  
12:25PM 21 divided certification.

12:25PM 22 Now, the next thing I'd like to talk  
12:25PM 23 about is this slide that we keep seeing. I like it  
12:25PM 24 because it has my name on it and I like anything that  
12:25PM 25 has my name, especially when after my name it says we

12:25PM 1 want money. My -- my family would love that official  
12:25PM 2 proceedings in court had Mr. Stris, we want money,  
12:25PM 3 there's something funny about that.

12:25PM 4 But on a serious note, there's a --  
12:25PM 5 there's a fundamental problem with the arguments being  
12:25PM 6 made here by UBS and we can take it right out of the  
12:25PM 7 quote from Bolin at the bottom. And what it says on  
12:25PM 8 this slide is: Rule 23(b)(2) cannot be used where  
12:25PM 9 Plaintiffs have nothing to gain from injunction and the  
12:25PM 10 declaratory relief they seek serves only to facilitate  
12:25PM 11 the award of damages.

12:25PM 12 That is such an important point because  
12:25PM 13 as I was trying to explain at the February 4th hearing,  
12:25PM 14 where I'm quoted as saying we want money, if you'll  
12:25PM 15 look in the full context of what I said, I was  
12:25PM 16 referring to the lengthy jurisprudence of the United  
12:25PM 17 States Supreme Court dealing with Section -- with 29  
12:26PM 18 USC 1132(a)(3). And in fact, in a long line of cases  
12:26PM 19 starting with Justice Scalia's Merten's decision, he  
12:26PM 20 made very clear, in fact he couldn't have made it  
12:26PM 21 clearer, no one can ever get damages under Section  
22 (a)(3), 502(a)(3) of ERISA.

23 So there's a big difference between  
24 money -- I'm sorry?

25 THE COURT: The court reporter is asking

1 for you to talk a little slower, so --

2 MR. STRIS: Oh, that's fair. I'm sorry,  
3 I got excited, because again, it had my name and money.  
4 I'll get it under control.

12:26PM 5 The -- the phrase damages has a very  
12:26PM 6 specific meaning and it's not money. The -- the --  
12:26PM 7 there's a long line of U.S. Supreme Court cases that  
12:26PM 8 make clear that under (a)(3), which is the provision  
12:26PM 9 we're -- we're proceeding under, you -- you can -- you  
12:26PM 10 can get money, but you can't get compensatory damages.

12:26PM 11 And that's a distinction that Justice  
12:26PM 12 Scalia and at least five Justices in a series of  
12:27PM 13 Supreme Court cases, you know, we're talking about  
12:27PM 14 Merten's. We're talking about Great West versus  
12:27PM 15 Knudson. We're talking about Sereboff. We're talking  
12:27PM 16 about, you know, case after case after case. They've  
12:27PM 17 made it clear that appropriate, equitable relief, which  
12:27PM 18 is what we're seeking, is not damages.

12:27PM 19 So at the end of the day, I really don't  
12:27PM 20 think there's much force to the argument UBS is making  
12:27PM 21 because it's not the case that we have nothing to gain  
12:27PM 22 from injunction. And it's not the case that the  
12:27PM 23 declaratory relief that we're seeking serves only to  
12:27PM 24 facilitate an award of damages.

12:27PM 25 Every member of the class will benefit

1 from an injunction that forces UBS to -- to own up to  
2 the fact that they really were operating a retirement  
3 plan. And yes, it is the case that if the plan is  
4 reformed or if an injunction is ordered, then the  
5 benefits to which each class member would be entitled  
6 to under the plan will be much higher than under the  
7 status quo. And that means we want money and we will  
8 get money. But in no way does that mean that we're  
9 talking about damages or the rule that Bolin is setting  
10 forth. It just flies in the face of ERISA  
11 jurisprudence.

12 Now, that said, we have to win. We have  
13 to prove the merits of the ERISA case, but we're here  
14 at the class certification stage and I just think that  
15 that argument is a red herring.

16 The last thing I really wanted to talk  
17 about was this notion of individualized issues in the  
18 case. This idea that we're going to have Plaintiffs  
19 running around testifying about who said what to whom.  
20 That's just wrong for -- on a few levels.

21 The first reason it's wrong is the vast  
22 majority of the merits of this case is going to be  
23 about the way in which UBS operated their plan. It's  
24 going to be about issues like who were they defining as  
25 retired under the plan. In their 2005 manual, in their

12:28PM 1 2009 manual, page after page sets up classes of  
12:28PM 2 retirees.

12:29PM 3                   How were they treated? Who got money?  
12:29PM 4 What money did they get? The irony of the expert  
12:29PM 5 reports that UBS has put forward and opposing Counsels'  
12:29PM 6 entire position is, they love to repeat the mantra  
12:29PM 7 again and again, how could this be a retirement plan if  
12:29PM 8 80 percent of the distributions were made while people  
12:29PM 9 were still working. Well, that's because -- first of  
12:29PM 10 all, I'm not sure that it's true, but the reason why  
12:29PM 11 that doesn't matter is because hundreds of millions of  
12:29PM 12 dollars, namely the portion that was reserved for  
12:29PM 13 retirees, under the very definition of the plan were  
12:29PM 14 forfeited. So basically they're just looking at one  
12:29PM 15 slice of the puzzle.

12:29PM 16                   And -- and this is a very important  
12:29PM 17 point, because if I could just throw out a thought  
12:29PM 18 experiment, if the position that UBS were taking is --  
12:29PM 19 were right, that would mean that any company could take  
12:29PM 20 a huge retirement plan, that -- that everyone would  
12:29PM 21 agree is a retirement plan, has a billion dollars in it  
12:29PM 22 and if they didn't want it to be treated as a  
12:29PM 23 retirement plan because they wanted to get around the  
12:29PM 24 rules of ERISA, they could create a big bonus plan and  
12:29PM 25 they could push them together. And then they could



1 say, well, I took my hundred million -- my billion  
2 dollar retirement plan and my billion dollar bonus  
3 plan, now look, there's a billion dollars worth of  
4 transactions that sure don't look like a retirement  
5 plan and they could entirely evade all requirements of  
6 ERISA.

7 Doesn't work that way. That's why  
8 there's a facts and circumstances test and that's why  
9 these issues are going to go to one of degree, as you  
10 put it earlier, Your Honor.

11 So I don't want to wade too much into the  
12 merits, because that's going to come later, but the  
13 notion that somehow we're going to have individuals  
14 coming and testifying about reliance or their specific  
15 circumstances, it's just not true.

16 And Mr. Levitan in his deposition  
17 admitted and testified that the official correspondence  
18 from UBS on this plan came from a few senior executives  
19 who would have annual meetings with all of the  
20 supervisors and there -- there -- he didn't know  
21 whether there were written correspondence associated  
22 with that, so the reason I'm mentioning this on the  
23 record is because insofar as representations are  
24 relevant in this case, there is no doubt as a result of  
25 that deposition testimony that we will be able to

12:31PM 1 address those issues on a class basis.

12:31PM 2 We'll be able to depose those individuals  
12:31PM 3 who essentially were speaking for UBS in training the  
12:31PM 4 trainers. We'll be able to request documents on what  
12:31PM 5 was sent. We will never have to resort to any sort of  
12:31PM 6 he said, she said, individuals talking about what was  
12:31PM 7 discussed at the watercooler. And the suggestion that  
12:31PM 8 somehow that's the nub of this case and that it  
12:31PM 9 undermines predominance or superiority, it is just  
12:31PM 10 entirely off base.

12:31PM 11 THE COURT: All right. Thank you, Mr.  
12:31PM 12 Stris.

12:31PM 13 Mr. Scalia, all good things must come to  
12:31PM 14 an end. I -- I think that you've thoroughly addressed  
12:31PM 15 the -- the issues in your briefs. Is there -- if  
12:31PM 16 there's something that you haven't had a chance to talk  
12:31PM 17 about at all, you can have the rest of the minute  
12:31PM 18 that's left.

12:31PM 19 MR. SCALIA: Just to sum up, Your Honor,  
12:32PM 20 the statute of limitations, because Plaintiffs could  
12:32PM 21 sue at the time that they weren't vested, their claim  
12:32PM 22 by definition -- definition had to accrue then. The  
12:32PM 23 moment you can sue, the limitations period will come.  
12:32PM 24 Waiver on that issue, I think that's simply and  
12:32PM 25 clearly, honestly disposes of all of these other issues

12:32PM 1 that we've wrestled with today.

12:32PM 2 And finally, with regard to (b)(2) and  
12:32PM 3 (b)(3) as I mentioned earlier, I simply think that for  
12:32PM 4 the Court to certify so that Plaintiffs with no ability  
12:32PM 5 to opt out would be bound by the central issue in the  
12:32PM 6 case would conflict with the careful structure between  
12:32PM 7 (b)(2) and (b)(3), which the McManus Fleetwood case we  
12:32PM 8 cite in our brief addresses and also would violate due  
12:32PM 9 process ultimately for those who might be bound by a  
12:32PM 10 determination that it's an ERISA plan with no ability  
12:32PM 11 beforehand to have opted out.

12:32PM 12 So for those reasons because Plaintiffs  
12:32PM 13 themselves have presented this case as one that  
12:32PM 14 involves what they were told by a variety of people and  
12:32PM 15 for -- for all of those reasons we believe that  
12:32PM 16 certification under any prong of (b) is inappropriate.  
12:33PM 17 Instead, certification should be denied for reasons  
12:33PM 18 beginning with the class waiver and extending all the  
12:33PM 19 way through (b)(3).

12:33PM 20 Thank you.

12:33PM 21 THE COURT: Thank you all. We'll issue  
12:33PM 22 a ruling on this as soon as we can.

12:33PM 23 I appreciate your attendance and your  
12:33PM 24 arguments. Thank you.

12:33PM 25 MR. ANDERSON: Your Honor, briefly, we've

12:33PM 1 got a proposed order that we'd like to submit to the  
12:33PM 2 Court. In addition, as a reminder, if the Court does  
12:33PM 3 think it will need to reach the merits of whether or  
12:33PM 4 not the PartnerPlus Plan is an ERISA plan, we do have a  
12:33PM 5 pending motion for a partial continuance that we would  
12:33PM 6 like to take up at that point.

12:33PM 7 THE COURT: All right. You can  
12:33PM 8 certainly file anything you need along those lines into  
12:33PM 9 the record. I -- I don't see any basis on what we've  
12:33PM 10 heard today to grant any continuance on this. I think  
12:33PM 11 that the matter has been properly submitted.

12:34PM 12 MR. ANDERSON: Yes, Your Honor.

12:34PM 13 MR. SCALIA: Your -- Your Honor, on --  
12:34PM 14 on that note, I appreciate Mr. Anderson raising it.  
12:34PM 15 Can defense rest comfortable in not responding to that  
12:34PM 16 motion at this point? If the Court thinks that a  
12:34PM 17 response is warranted, we can wait for such an order?

12:34PM 18 THE COURT: Yes.

12:34PM 19 MR. SCALIA: Thank you, Your Honor.

12:34PM 20 MR. GOODMAN: You want us to file our  
12:34PM 21 proposed order, Your Honor?

12:34PM 22 THE COURT: Proposed order regarding?

12:34PM 23 MR. GOODMAN: Proposed order regarding  
12:34PM 24 the certification motion?

12:34PM 25 THE COURT: Oh, I see. I think it'd be

12:34PM 1 best if you e-filed that.

12:34PM 2 MR. GOODMAN: That way you'd have the  
12:34PM 3 text.

12:34PM 4 THE COURT: And everybody will have it.  
12:34PM 5 Well, it'll be in that. Well, you're just talking  
12:34PM 6 about the language that you are suggesting the Court  
12:34PM 7 use?

12:34PM 8 MR. GOODMAN: We will get it done this  
12:34PM 9 afternoon.

12:34PM 10 THE COURT: Okay.

12:34PM 11 MR. GOODMAN: Thank you very much.

12:34PM 12 THE COURT: All right. Thank you. We're  
12:34PM 13 adjourned.

14 (Adjournment.)

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**Certification**

**I HEREBY CERTIFY** that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

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**MELISSA J. CARSON**

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**DATE**

Deputy Official Reporter  
State of Texas No.: 1737  
Expiration Date: 12/31/13